MIXED UP QUESTIONS OF FACT AND LAW: ILLINOIS STANDARDS OF APPELLATE REVIEW IN CIVIL CASES FOLLOWING THE 1997 AMENDMENT TO SUPREME COURT RULE 341

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Six years have passed since the Illinois Supreme Court amended Rule 341 to require that appellants include in their legal briefs a statement of the applicable standard of review for each issue on appeal.[1] In adopting this amendment, Illinois courts somewhat belatedly joined a national trend focusing heightened attention on a difficult yet critical aspect of appellate practice: the degree of deference an appellate court should give to various determinations of courts, juries, and administrative agencies when the propriety of those determinations is on appeal.

A key goal of proponents of the 1997 rule change was to promote just such increased attention. In a 1992 article recommending that Rule 341 be amended, Professor Timothy O'Neill of The John Marshall Law School decried the general lack of adequate discussion and analysis of the appropriate level of appellate review in Illinois criminal cases and contrasted that lack of attention to the growing debate over the issue in the federal courts.[2] After examining numerous criminal cases where Illinois appellate courts either ignored the applicable standard of review entirely or applied the manifest weight of the evidence standard[3] reflexively without analysis, Professor O'Neill stated:

> [T]he point is not that Illinois is necessarily wrong on every issue. The problem is that Illinois courts refuse to acknowledge the conflicts involving standards of review in criminal cases. Moreover, by refusing to acknowledge the conflicts, they also avoid providing principled reasons for the positions

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1. ILL. SUP. CT. R. 341(e)(3) (stating in relevant part that "[t]he appellant must include a concise statement of the applicable standard of review for each issue, with citation to authority, either in the discussion of the issue in the argument or under a separate heading placed before the discussion in the argument"). Appellees need to include a discussion of the standard of review only "to the extent that the presentation by the appellant is deemed unsatisfactory." ILL. SUP. CT. R. 341(f).
2. Timothy P. O'Neill, *Standards of Review in Illinois Criminal Cases: The Need for Major Reform*, 17 S. ILL. U.L.J. 51 (1992) [hereinafter O'Neill, *Illinois Criminal Cases*].
3. See discussion *infra* Part III.B.

> they hold. Illinois courts have for years abdicated their responsibilities in this key area of the law.[4]

In proposing solutions to "the sorry state" of Illinois law,[5] Professor O'Neill noted that appellate lawyers were also partially responsible,[6] and he proposed that all appellate briefs and all appellate judicial opinions be required to address the proper standard of review.[7]

In 1995, then-Associate Dean and Professor Susan L. Brody of John Marshall joined Professor O'Neill in advocating an amendment to Supreme Court Rule 341.[8] Summarizing the need for a rule requiring the parties to brief standards of review in all appeals, the two authors expanded their attack on the then-current state of standard of review jurisprudence to include Illinois courts' treatment of the issue in civil,[9] as well as criminal, cases:

> Both civil and criminal appellate decisions in Illinois often lack serious discussion of the appropriate standard of review; indeed, reviewing courts frequently decide issues without mentioning any standard of review. Other decisions may mention one or even several standards, but then fail either to define or to explain their use. Worse yet, Illinois courts sometimes use the same standard of review for questions that deserve different degrees of

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4. *Id.* at 77.
5. *Id.* at 82.
6. Professor O'Neill might also have pointed to the relative paucity of discussion of the issue in Illinois law reviews, journals, and other professional publications. That academic and professional silence in Illinois may now be slowly ending. In addition to the 1992 O'Neill article, *supra* note 2, and Timothy P. O'Neill & Susan L. Brody, *Taking Standards of Review Seriously: A Proposal to Amend Rule 341*, 83 ILL. B.J. 512 (1995), see JEFFREY A. PARNESS, ILLINOIS CIVIL PROCEDURE § 15–3 (1998); Hugh C. Griffin & Hugh S. Balsam, *The Standard of Review in Civil Cases in Illinois: More Than Meets the Eye*, 8 APP. L. REV. 1 (2002–2003). The bulk of the commentary continues to be found in publications aimed primarily at practitioners. *See, e.g.*, Timothy P. O'Neill, *High Court Climbs Toward the Light on Proper Review Standards*, 147 CHI. DAILY L. BULL. 24 (Feb. 2, 2001) [hereinafter O'Neill, *High Court Climbs*]; Thomas H. Fegan, *Identifying Standard of Review a Matter of Common Sense*, 144 CHI. DAILY L. BULL. 16 (Jan. 23, 1998).
7. O'Neill, *Illinois Criminal Cases*, *supra* note 2. In urging Illinois appellate judges to begin their legal opinions with an analysis of the standard of review, Professor O'Neill pointed with approval to the practice of the Ninth Circuit Federal Court of Appeals. *Id.* at 82–83. Many jurisdictions now require that appellants state the applicable standard of review in their briefs. *See, e.g.*, FED. R. APP. P. 28(a)(9)(B); HI ST RAP RULE 28(b)(5); PA ST RAP RULE 2111; UT R RAP 24(a)(5); *see also* STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, 1 FEDERAL STANDARDS OF REVIEW § 1.02, at 1–7 to 1–9 & n. 57 (3d ed.1999) (discussing the inclusion of standards of review in appellate briefs).
8. O'Neill & Brody, *supra* note 6.
9. *Id.* at 550. Specifically, the authors concluded that Illinois courts have been "far too lax" in addressing standards of review in civil cases, thereby ignoring important policy decisions and forcing the bar "to play a guessing game" as to the degree of deference the courts would accord to decisions below. *Id.*

> deference. Finally, Illinois courts sometimes apply a particular standard of review inconsistently. Thus, lawyers receive inadequate direction from our reviewing courts.[10]

It was the expressed hope of the authors that requiring appellants to brief the issue of the applicable standard of review would "force both Illinois judges and attorneys to confront issues that have been ignored for far too long",[11] thereby improving Illinois appellate jurisprudence.[12]

Since its publication, the Brody & O'Neill article has been cited by the Illinois Supreme Court and Illinois appellate courts in several significant decisions.[13] Under its guise, the Illinois Supreme Court has introduced a new, intermediate, "clearly erroneous" standard of review in some cases involving so-called mixed questions of fact and law.[14] Despite the apparent increased attention to standards of review, however, the reasoning of recent cases has not always been clear, and a number of questions remain unanswered.

The goal of this article is to chronicle and assess developments in Illinois standards of review since the publication of the O'Neill and Brody article in 1995, with particular emphasis on the standard of review for mixed questions of fact and law in civil cases. Because recent changes in the applicable standards of review in Illinois have been largely based on federal precedents, Part I contains an overview[15] of federal standards of appellate review with

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10. *Id.* at 512.
11. *Id.* at 513.
12. *Id.* at 550. The authors also repeated Professor O'Neill's earlier recommendation that Illinois appellate judges should begin their decisions with a discussion of the applicable standard of review. *Id.*
13. *See infra* Part IV.
14. *See infra* notes 117–19 and accompanying text. Although there is no universally accepted definition, mixed questions of fact and law, broadly defined, involve the application of rules of law to one or more "basic" or historical facts and factual inferences.
15. Parts I and II are not intended as a comprehensive analysis of the complexities and nuances of the various federal standards of review. To place the recent Illinois developments in context, however, it is necessary to have at least a basic understanding of those federal standards. For further study of federal standards of review in depth, an excellent place to begin is with the comprehensive treatise by Professors Childress and Davis. 1 CHILDRESS & DAVIS, *supra* note 7. More basic overviews are contained in Patrick W. Brennan, *Standards of Appellate Review*, 33 DEF. L. J. 377 (1984); Steven Alan Childress, *A 1995 Primer on Standards of Review in Federal Civil Appeals*, 161 F.R.D. 123 (1995) [hereinafter Childress, *A 1995 Primer*], and Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S. D. L. REV. 468, 469 (1988) [hereinafter Davis, *A Basic Guide*]. *See also* MICHAEL E. TIGAR & JANE B. TIGAR, FEDERAL APPEALS: JURISDICTION AND PRACTICE § 5.1 (3rd ed. 2003); George A. Somerville, *Standards of Appellate Review*, 15 Litigation 23 (1989). One goal of this article is to provide an additional single-source overview of Illinois and federal courts' handling of mixed questions of fact and law as a reference for Illinois courts and practitioners, as well as others interested in the development of Illinois standards of appellate review.

respect to determinations by trial courts and administrative agencies.[16] Turning to the underlying purposes and rationales for standards of review, Part II describes the limitations of the traditional "fact versus law" distinction as a method of choosing applicable standards of review and compares the so-called "functional approach"[17] for determining the appropriate standard. Part II then discusses federal courts' treatment of mixed questions of fact and law under both the traditional and functional approaches. Against this backdrop, Part III compares the traditional Illinois standards of review applicable to conclusions of law and findings of fact by various decision-making bodies, focusing principally on Illinois Supreme Court decisions. Part IV then chronicles and analyzes Illinois developments in the supreme court's treatment of mixed questions since 1995. Included is an analysis of the process by which the court appears to be changing standards of review for mixed questions of fact and law.

Part V analyzes the potential impact of the Illinois Supreme Court's adoption of a new, intermediate standard of review. This article recommends that the supreme court take further steps toward articulating the functional or policy grounds that underlie the court's designation of the level of deference to accord to determinations of mixed questions by trial courts and administrative agencies, taking into account the ways in which Illinois decision-making bodies do and do not share similar institutional concerns with their federal counterparts. The article also recommends that the court take further steps to clarify the source, scope, and applicability of the new intermediate standard of review. Part VI of the article concludes that Illinois law governing standards of review is no longer in quite such a "sorry state." Nevertheless, treatment by Illinois courts of mixed questions of fact and law on appeal is indeed "mixed up" at present in that divergent approaches are prevalent and the reasons for the divergence are often unclear. Thus, further efforts by the courts to clarify the meaning and scope of the new standard would benefit decision-makers and practitioners alike.

I. OVERVIEW OF FEDERAL STANDARDS OF APPELLATE REVIEW

16. For purposes of comparison and to explain the genesis of various standards of review, the article also describes the standard of appellate review applicable to jury determinations at the federal and state levels. Because of constitutional and historical considerations, the appellate courts have less flexibility in varying those standards in the jury context. *See infra* notes 52–53 and accompanying text.

17. The term "functional approach" is derived from United States v. McConney, 728 F.2d 1195, 1204 (9th Cir. 1982). *See also* 1 CHILDRESS & DAVIS, *supra* note 7, § 2.13, at 2–74.

A. Standards of Review Generally

The term "standard of review" is most frequently, and perhaps most clearly, described as the degree of deference an appellate court[18] will accord to the actions or decisions of a jury, a trial court, an administrative agency, or another decision-maker.[19] Viewed from a different perspective, the term also refers to the respective powers and responsibilities of the appellate court and the tribunal whose actions or decisions are under review.[20] Although the terms "standard of review" and "scope of review" are sometimes used interchangeably,[21] the latter term, in its narrower meaning, refers to the particular actions or omissions by the decision-maker that are or are not subject to review on appeal.[22] In the words of one commentator, "standard of review" refers to the "depth or intensity" with which lower court decisions are

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18. Although the principal focus of this article is on the standards of review applicable to appellate courts, similar rules and policies often apply to other reviewing bodies. *See, e.g.*, First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) (discussing standard of review applicable to district court review of matters decided in arbitration).

19. *See, e.g.*, 1 CHILDRESS & DAVIS, *supra* note 7, § 1.01, at 1–2; Davis, *A Basic Guide*, *supra* note 15, at 469 (standard of review "denotes the degree of deference that a reviewing court gives to the actions or decisions under review").

20. *See, e.g.*, Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROC. 47, 47–48 (2000) [hereinafter Davis, *Standards of Review*] (describing "standard of review" as a statement of the power of both the appellate court and the tribunal below); 1 CHILDRESS & DAVIS, *supra* note 7, § 1.01, at 1–3 ("Whether looked at as an enabler and legitimator of review, or as a limit on the reviewer, the fundamental notion behind a standard of review is that of defining the relationship and power shared among judicial bodies").

21. *See, e.g.*, Paul D. Carrington, *The Power of District Judges and the Responsibility of Courts of Appeals*, 3 GA. L. REV. 507, 517–519 (1969) [hereinafter Carrington, *Power of District Judges*] (using scope of review to refer to deferential tests); Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C.L. REV. 993, 997 (1986) (using scope of review to refer to the division of power and responsibility between the trial and appellate level).

22. J. Dickinson Phillips, Jr., *The Appellate Review Function: Scope of Review*, LAW & CONTEMP. PROBS., Spring 1984, at 1. *See also* 1 CHILDRESS & DAVIS, *supra* note 7, § 1.03, at 1–17 to 1–19 (explaining that the more precise use of the term "scope of review" focuses on what issues an appellate court will consider, rather than the deference that will be accorded the decision-maker's determination of those issues). Other topics that should be distinguished from standards of review include burdens of proof, the scope of judicial review of legislative actions, and appellate jurisdiction. *See, e.g.*, Concrete Pipe & Prod. of Ca., Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602, 622–623 (1992) (discussing differences between burdens of proof and standards of review); 1 CHILDRESS & DAVIS, *supra* note 7, § 1.03, at 1–19 to 1–24 (explaining distinctions between above concepts).

subject to review on appeal, while "scope of review" refers to the "breadth of the review function."[23]

The sources of standards of appellate review include constitutions,[24] statutes,[25] court rules,[26] and judicial decisions.[27] In general, standards of review at both the state and federal level fall into three categories, depending on whether the issue on appeal is a question of law, a question of fact, or a challenge to a discretionary decision.[28] Under both federal and state law, the particular standard of review applicable to each category depends on both the type of proceeding that gave rise to the issue and the identity of the original decision-maker.[29] Within this general structure, however, the federal and state standards of review vary in several notable respects.[30]

B. Basic Federal Standards of Appellate Review of Conclusions of Law[31]

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23. Phillips, *supra* note 22, at 1.
24. For example, the Seventh Amendment to the United States Constitution provides in relevant part that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.
25. *E.g.*, 5 U.S.C. §706(2)(E) (administrative agency fact-findings may not be set aside if supported by substantial evidence); 28 U.S.C. §157(c)(1) (district judge in bankruptcy cases must review the bankruptcy judge's findings of fact and conclusions of law *de novo* if a party raises objections thereto).
26. *E.g.*, FED. R. CIV. P. 52(a) (findings of fact in a non-jury trial can only be set aside if "clearly erroneous"); ILL SUP. CT. R. 366 (2002).
27. *E.g.*, Thornburg v. Gingles, 478 U.S. 30, 79 (1986). *See also* Louis, *supra* note 21, at 999 (observing that the jury standard of review is judicially created)presumably based on its common law origins).
28. In general, mixed questions of fact and law are a "hybrid" of the first two categories. Davis, *A Basic Guide*, *supra* note 15, at 470. *See infra* Part II.A.
29. Davis, *A Basic Guide*, *supra*, note 15, at 468–471. In an effort to give appellate counsel and others a fundamental understanding of the language and thrust of the rules governing standards of review, Professor Davis has prepared a guide that includes a simplified chart. The chart identifies four basic types of proceedings: civil, criminal, formal administrative, and informal administrative. It also identifies five basic decision-makers: jury, agency, judge, master, and magistrate. Within those categories, the chart summarizes the basic standards of review applicable to issues of fact, law, and discretion, as well as the hybrid category of mixed questions of fact and law. *Id*.
30. See *infra* Part III.
31. A separate, but related, body of law and literature analyzes the standard of appellate review applicable to discretionary decisions. *See generally* 1 CHILDRESS & DAVIS, *supra* note 7, ch. 4. Discretionary decisions have been described as those that are left to the choice of the decision- maker from an array of alternatives. Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 636–37 (1971). *See generally* Davis, *Standards of Review*, *supra* note 20. The standard of review applicable to discretionary decisions is generally highly deferential and falls under the rubric "abuse of discretion." *See* Davis, *A Basic Guide*, *supra* note 15, at 480. For a helpful overview of

Deciding questions of law is the particular province of the courts, with the federal appellate courts playing the pre-eminent role. In fact, determining questions of law is "the very essence of the appellate court's role"[32] and reflects the appellate courts' inherent power, ability, and competency.[33] As a corollary to this ultimate power of determination, federal appellate courts need give little, if any deference, to the conclusions of law of the original decision maker.[34] They are hence free to substitute their judgment for that of the tribunal below. This power of federal appellate courts and other reviewing bodies to decide questions of law without according deference to prior decision makers is often referred to as *de novo* review. Alternative formulations refer to "free," "plenary," or "independent" review.[35]

There are two principal exceptions to the general rule of *de novo* or free review of questions of law at the federal level. The first is a type of practical deference that appellate courts often give to interpretations of common law and statutory legal principles below, regardless of the identity of the decision maker. Here, despite the availability of free review, reviewing courts have demonstrated an implicit tendency to affirm, rather than reverse, and they often accord deference to the original decision-maker out of notions of comity.[36]

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appellate review of discretionary decisions and some of the leading Supreme Court cases, see Davis, *Standards of Review*, *supra* note 20.

32. Brennan, *supra* note 15, at 407.

33. *See* 1 CHILDRESS & DAVIS, *supra* note 7, § 2.14, at 2–79 (de novo review reflects the appellate courts "power, ability, and competency to come to a different conclusion on the record as determined below"). See discussion of appellate court functions and expertise in Part II *infra*.

34. *See* 1 CHILDRESS & DAVIS, *supra* note 7, § 2.14, at 2–79 ("no particular deference" given); Richard H.W. Maloy, *'Standards of Review') Just the Tip of the Icicle*, 77 U. DET. MERCY L. REV. 603, 611 (2000) ("little or no" deference given).

35. *See, e.g.*, Salve Regina Coll. v. Russell, 499 U.S. 225, 231–233 (1991) (using the terms de novo, plenary, and independent review interchangeably); 1 CHILDRESS & DAVIS, *supra* note 7, § 2.13, at 2–79; s*ee also* Louis, *supra* note 21, at 993 (determinations of law are ordinarily reviewed "freely or independently" when appealed); Maloy, *supra* note 34, at 611 (questions of law receive "plenary" or "independent" review). This article uses all four terms interchangeably to refer to the standard of review applicable to questions of law and certain other issues.

36. *See* Davis, *A Basic Guide*, *supra* note 15, at 476 (also noting a "presumption of regularity" in the proceedings below); 1 CHILDRESS & DAVIS, *supra* note 7, § 2.14, at 2–81 to 2–82 (adding that appellate courts extend "practical deference" in some cases).

The second exception arises in connection with judicial review of conclusions of law by administrative agencies.[37] Here, there has historically been a strong tendency)albeit of uncertain scope)to give deference to administrative agency interpretations of statutes and regulations within the agencies' purview.[38] In this regard, the federal judiciary and administrative

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37. Section 706 of the Administrative Procedure Act ("APA") establishes a "presumptive 'floor'" under appellate review of administrative agency determinations. TIGAR & TIGAR, *supra* note 15, § 5.11, at 298. 5 U.S.C. Section 706, entitled "Scope of review," provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence. . . ; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706. The standards of review applicable to the determinations of a particular federal administrative agency may be set forth in the agency's enabling act, which may vary from or supplement the APA standards. TIGAR & TIGAR, *supra* note 15. The APA standards of review may be applied by analogy even where they are not directly applicable. 2 CHILDRESS & DAVIS, *supra* note 7, § 14.01, at 14–2.

38. Adding to the sometimes confusing use of terminology in this area, the degree of judicial deference to administrative agency determinations is generally referred to as "scope of review," rather than "standard of review." BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 10.01 (3d ed. 1991); Paul R. Verkuil, *An Outcomes Analysis of Scope of Review Standards*, 44 WM. & MARY L. REV. 679 (2002) (using scope of review to refer to the degree of deference accorded administrative agency determinations). *See supra* notes 21–23 and accompanying text. Because administrative agencies act in both quasi-legislative and quasi-judicial capacities, the federal rules governing the applicable scope of review are quite complex. Professors Childress and Davis have identified seven different levels of review ranging from *de novo* review to no review. 2 CHILDRESS & DAVIS, *supra* note 7, § 15.01, at 15–2. The judicial decisions interpreting these rules have been universally characterized as inconsistent and confusing. *See, e.g.*,Ronald M. Levin, *Identifying Questions of Law in Administrative Law*, 74 GEO. L. J. 1, 1 & n.1 (1985–1986) (judicial explanations of scope of review have been characterized by academics as "vacuous and chaotic"). For more in-depth discussions of the scope of review in federal administrative law cases, see 2 CHILDRESS & DAVIS, *supra* note 7, ch. 14; RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §§ 3.1 to 3.6; 11.1 to 11.4 (2002); LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1976); SCHWARTZ, *supra*, ch. 10.

agencies have been said to share the role of pronouncing and making law, with the court as "senior partner."[39]

The historic tendency of federal courts to accord no deference, some deference, or substantial deference to agency legal interpretations on an informal basis has been significantly altered in the last twenty years by the Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[40] In *Chevron*, the Supreme Court stated that where a statute administered by an agency is silent or ambiguous, a court may not substitute its own interpretation of the statute in place of a "reasonable interpretation" by the agency.[41] From that dicta a substantial, and sometimes

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39. Louis L. Jaffe, *Judicial Review: Question of Law*, 69 HARV. L. REV. 239, 239 (1955). The courts' primary law-making role has long been circumscribed by two factors: recognition of the administrative agencies' expertise and the pressures of crowded dockets. SCHWARTZ, *supra* note 38, at 624–25. The second exception thus reflects a policy decision to accord some or substantial deference to the legal conclusions of administrative agencies in various instances to take into account that comparative expertise and reduce the number of cases with lengthy and complex records pending on appellate dockets. *Id.* *See also* Udall v. Tallman, 380 U.S. 1, 16 (1965) ("It is well established that an agency's construction of its own regulations is entitled to substantial deference."); Carrington, *Power of District Judges*, *supra* note 21, at 518 (administrative agencies have their own role to play in formulating federal policy and are entitled to "some deference" with respect to their legal conclusions); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 562–67 (1985) (describing factors courts rely on in determining whether to defer to agency interpretations); Levin, *supra* note 38, at 4 (courts have primary authority for resolving questions of law, but "at least some weight" should be accorded to the agency's interpretation).

40. 467 U.S. 837 (1984). *See* Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001) (*Chevron* "dramatically expanded the circumstances in which courts must defer to agency interpretations of statutes"). *See generally* PIERCE, *supra* note 38, §§ 3.1 to 3.6.

41. 467 U.S. 837, 843 (1984). *Chevron* employs a two-pronged analysis. First, a court reviewing an agency interpretation of a statute must inquire whether Congress has directly addressed the precise question in issue. If so, both the court and the agency must effect congressional intent. If the statute leaves a "gap," however, the court must look for an explicit or implicit congressional delegation of authority to the agency to "elucidate" the statute by regulation. If there is such a delegation, the resulting agency regulation or interpretation is given "controlling weight" unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 842–844. In determining the reasonableness of the agency's interpretation, the reviewing court "need not conclude that the agency construction was the only one it permissibly could have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n. 11. In other words, a court may not substitute its own interpretation when the agency has interpreted the statute or rule in a "reasonable fashion." City of Chicago v. FCC, 199 F.3d 424, 428 (7th Cir. 1999); *see* Consol. Gas v. Supply Corp. v. FERC, 745 F.2d 281, 291 (4th Cir. 1984) (court can disregard interpretation that "black means white," but "if the choice lies between dark and light grey, the conclusion of the agency . . . in favor of one or the other will have great weight"). *But see* Presley v. Etowah County Comm'n, 502 U.S. 491, 508 (1992) ("Deference

contradictory,[42] body of precedent has grown, in which strong and *mandatory* deference is accorded to interpretations by federal administrative agencies of the statutes and regulations they administer.[43]

Although there have been some exceptions, the *Chevron* doctrine of mandatory deference has generally been applied in instances where an administrative agency has been empowered by Congress to engage in formal, rather than informal, rule-making or adjudication that results in rules with the force of law.[44] The Supreme Court has recently made clear, however, that even if the mandatory deference under *Chevron* is not invoked, courts may nevertheless continue to accord a discretionary form of deference to an agency's statutory or rule interpretation, based on factors such as "the degree of the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position."[45] In areas where these two forms of deference are not invoked and where other rules or considerations do not require deference, federal appellate courts retain their power of *de novo* review of agency determinations of law.[46]

C. Basic Federal Standards of Appellate Review of Findings of Fact

In contrast to the general rule that conclusions of law are reviewed freely and without deference to the original decision-maker, findings of fact are, with

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does not mean acquiescence.").

42. *See, e.g.*, 2 CHILDRESS & DAVIS, *supra* note 7, § 15.13, at 15–13 (finding "no discernible pattern" in the manner in which *Chevron* has been applied); Merrill & Hickman, *supra* note 40, at 920 (*Chevron* produced "an extraordinary amount of confusion" as to when it applies).

43. Although commentators have disagreed as to its source, this mandatory deference to agency legal interpretations is likely derived from the intent of Congress. *See* Merrill & Hickman, *supra* note 40, at 836 (concluding that the *Chevron* doctrine is legislatively mandated).

44. *See* United States v. Mead Corp., 533 U.S. 218, 229, 237 (2001) (important, though not sole, indicia of Congressional delegation of authority to fill statutory gaps is enactment of notice-and-comment rule-making or formal adjudicatory proceedings); *see also* City of Chicago v. FCC, 199 F.3d at 429, (an agency's statutory interpretation commands deference regardless of whether it is a result of adjudicative proceedings or rulemaking).

45. 533 U.S. at 227 (footnotes omitted). Such judicial deference to agency views may range from "great respect" to "near indifference," according to the Court. *Id.* In support of this flexible level of deference, the Court cited *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), which some had thought was replaced by *Chevron*. *See* Merrill & Flickman, *supra* note 40, at 856–857. The Court thus made clear that *Chevron* had not supplanted the earlier *Skidmore* decision. 533 U.S. at 235–238; *see also* Christensen v. Harris County, 529 U.S. 576 (2000).

46. *See* Sch. Dist. of Wisc. Dells v. Z.S., 295 F.3d 671, 674 (7th Cir. 2002) (Posner, J.) (in ordinary appeals of administrative action, judicial review of "pure" issues of law is plenary unless *Chevron* commits the question to the agency).

few exceptions,[47] given some level of deference by federal reviewing courts. In the federal judicial system, the degree of deference varies with the identity of the original fact-finder. In general, determinations of fact by juries and administrative agencies receive the most deference and those by federal trial courts receive the least.

1. Findings of Fact by Juries and Administrative Agencies: the Substantial Evidence Rule

It is a truism that questions of law are for the judge to decide, while questions of fact are for the jury.[48] At trial, jurors hear the evidence, receive instructions from the judge as to the applicable rules of law, deliberate among themselves to weigh the evidence, apply the law to the facts, and then render a verdict.[49] For reasons grounded in history and the Constitution,[50] the jury's decision at the end of that process will prevail except under limited circumstances.

Although the United States Supreme Court has appellate jurisdiction over both law and facts,[51] the Seventh Amendment protects against judicial

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47. The principal exception is the so-called "constitutional fact" doctrine. *See infra* note 148 and accompanying text. In some other instances, facts can be retried by a reviewing tribunal. *See, e.g.*, 5 U.S.C. § 552(a)(4)(A)(vii) (2003) (de novo review of agency denial of request for information); 28 U.S.C. § 157(c)(1) (district judge in bankruptcy cases will review the bankruptcy judge's findings of fact *de novo* if a party raises objections thereto).

48. *See, e.g.*, Dimick v. Schiedt, 293 U.S. 474, 486 (1935) (jury has power to determine the facts and court has power to determine the law); George C. Christie, *Judicial Review of Findings of Fact*, 87 NW. U. L. REV. , 14, 14 (1992) (same). This section of the discussion begins with the standard of review applicable to factfinding by juries because the standard of review applicable to findings of fact by administrative agencies is largely drawn from the jury precedents. *See infra* note 65.

49. In civil trials, the results of jury deliberations may take the form of a general verdict, which in actuality constitutes a mixed finding of fact and law that incorporates factual inferences. *See infra* note 145. To supplement a general verdict, a jury may be asked to make specific findings in response to written interrogatories about issues of fact necessary to reach the verdict. FED. R. CIV. P. 49(b). Alternatively, a jury may simply return a special verdict in the form of a special written finding on each issue of fact. FED. R. CIV. P. 49(a). The trial court then enters a judgment based on the special verdict. The same standard of review applies irrespective of the form the jury's findings take. *See* 1 CHILDRESS & DAVIS, *supra* note 7, § 3.10, at 3–79. Findings of advisory juries are, however, reviewed under the clearly erroneous rule. FED. R. CIV. P. 52(a).

50. *See, e.g.*, Brennan, *supra* note 15, at 381; Christie, *supra* note 48, at 15; Clark & Stone, *Review of Findings of Fact*, 4 U. CHI. L. REV. 190, 193 (1937).

51. U.S. CONST. art. III, § 2[2]. Article III provides in relevant part that "[I]n all the other Cases, the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." *Id.* *See* Brennan, *supra* note 15, at 395 (fear of usurpation of jury power combined with Seventh Amendment requires

incursions into the right to trial by jury by restricting the examination of facts tried by a jury to the common law standards in existence at the time the Constitution was adopted.[52] Hence, under long-standing interpretations by the United States Supreme Court, jury verdicts are given great deference. Jury verdicts are not unassailable, however, and can be reviewed by trial or appellate courts within "a limited range."[53] The standard of review applicable to jury verdicts in civil trials generally goes under the rubric of the "reasonableness" test or the "substantial evidence" test. Although the wording and focus of the two tests appear on the surface to vary, they are generally regarded as the "flip-sides" of the same inquiry.[54] When viewed from the perspective of reasonableness, the courts inquire whether reasonable minds could reach different conclusions based on the evidence presented to the

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a "hands- off" style of judicial review).

52. U.S. CONST. amend. VII. *See* Louis, *supra* note 21, at 997 n. 19 (Seventh Amendment preserves the right to trial by jury as it existed in 1791). The Seventh Amendment right to trial by jury in civil actions is not applicable to the states under the Fourteenth Amendment. Walker v. Sauvinet, 92 U.S. 90, 92 (1875). Therefore, states may regulate courts in their own way. *Id.*

53. 1 CHILDRESS & DAVIS, *supra* note 7, § 3.01, at 3–2. Procedurally, the sufficiency of the evidence to support a verdict is often raised when the appellant asserts on appeal that it was error for the district court judge to deny a motion for a judgment as a matter of law under Rule 50. FED. R. CIV. P. 50. *See, e.g.*, SIBIA Neurosciences, Inc. v. Cadus Pharm. Corp., 225 F.3d 1349 (Fed. Cir. 2000); Wichman v. Board of Trustees, 180 F.3d 791 (7th Cir. 1999). Sufficiency questions are also raised when a trial court *grants* a motion for a judgment as a matter of law under Rule 50, taking the case away from the jury. Rule 50 empowers a court to grant such a motion if a party has been fully heard on an issue and there is no legally sufficient basis for a reasonable jury to have found for that party on that issue. FED. R. CIV. P. 50(a)(1). *See* 1 CHILDRESS & DAVIS, *supra* note 7, § 3.01, at 3–3 (explaining the relationship between Rule 50 and the jury standard of review). Decisions to grant or deny motions for judgment as a matter of law are reviewed *de novo* on appeal. Lane v. Hardee's Food Systems, Inc., 184 F.3d 705, 707 (7th Cir. 1999).

54. 1 CHILDRESS & DAVIS, *supra* note 7, § 3.01, at 3–8 (courts restating reasonableness review as a substantial evidence test "intend no real difference in meaning or result"); 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2524, at 265–66 (2d ed. 2003) (substantial evidence test is unlikely to result in any significant differences in result from the reasonableness test); Brennan, *supra* note 15, at 387 (substantial evidence is a test of both sufficiency and reasonableness).

jury.[55] If reasonable minds *could* differ, the jury's conclusion prevails and the verdict must stand.

Approaching the question from the opposite side of the coin, the courts review a jury's verdict to determine whether there is a sufficient evidentiary basis)in other words, "substantial evidence")to support it.[56] In an early case, the Supreme Court characterized the substantial evidence test as requiring "such relevant evidence as a reasonable mind could accept as adequate to support a conclusion."[57] The Seventh Circuit has described the test as the process of "determining whether the evidence to support the verdict is substantial; a mere scintilla of evidence will not suffice."[58] Regardless of the precise wording used to define the test, a jury verdict will not be overturned if it is found to be supported by substantial evidence. On the other hand, a verdict is reversible if it does *not* have a sufficient evidentiary basis, either because there is a mere scintilla of supporting evidence or there are simply no facts in support.[59]

A judicial determination that a verdict is supported by substantial evidence does not mean that the court is weighing the evidence in the traditional sense.

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55. 1 CHILDRESS & DAVIS, *supra* note 7, § 3.01, at 3–6. This formulation of the reasonableness test appears to represent the authors' synthesis of the many cases expounding the test. As with most standards of review, courts have described the jury standard under a number of different formulations. *See, e.g.*, Concrete Pipe & Prod. of Ca., Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602, 623 (1993) (reasonableness standard requires the reviewer to sustain a factual determination "unless it is so unlikely that no reasonable person would find it to be true"); Comm'r of Internal Revenue v. Duberstein, 363 U.S. 278, 291 (1960) ("Where a jury has tried the matter upon correct instructions, the only inquiry is whether it cannot be said that reasonable men could reach differing conclusions on the issue."); Collins v. Kibort, 143 F.3d 331, 335 (7th Cir. 1998) (a jury verdict will be overturned only if the court concludes that "no rational jury" could have found for the prevailing party); Liberty Mut. Ins. Co. v. Falgoust, 386 F.2d 248, 253 (5th Cir. 1967) ("the standard for reviewing a jury verdict is whether the state of proof is such that reasonable and impartial minds could reach the conclusion that the jury expressed in its verdict"). These varying formulations of the test range from helpful to outright wrong. *See* 1 CHILDRESS & DAVIS, *supra* note 7, § 3.02, at 3–11 to 3–15; 3–19 to 3–21.

56. Brennan, *supra* note 15, at 381 (explaining that the substantial evidence standard arose from Supreme Court cases dating back to *Lancaster v. Collins*, 115 U.S. 222, 225 (1885)). Courts also describe the substantial evidence test using different, and sometimes misleading, formulations. *See* 1 CHILDRESS & DAVIS, *supra* note 7, § 3.10.

57. A. B. Small Co. v. Lamborn & Co., 267 U.S. 248, 254 (1925).

58. La Montagne v. Am. Convenience Prods., 750 F.2d 1405, 1410 (7th Cir. 1984) (citing Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969)).

59. *See* Brennan, *supra* note 15, at 384 (adding that a jury verdict is reversible if the supporting evidence is "inherently impossible, opposed to the laws of nature, or clearly incredible").

That task is the jury's prerogative.[60] The Supreme Court recently re-emphasized this and other limitations on the role of a court reviewing the sufficiency of a jury verdict in *Reeves v. Sanderson Plumbing Products, Inc.*[61] After holding that a reviewing court must look at all the evidence in the record to determine its sufficiency,[62] the Court stated that the reviewing body must "draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence."[63] Thus, an appellate court may not substitute its judgment as to the weight of the evidence for that of the jury, even if the court would have reached a different conclusion.[64]

The standard of review applicable to findings of fact by federal administrative agencies generally parallels and draws from the standard applicable to findings of fact by juries in civil cases.[65] Although it may not

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60. *See, e.g.*, Lane v. Hardee's Food Sys., Inc., 184 F.3d 705, 707 (7th Cir. 1999) (reviewing court may not resolve any conflicts in testimony or weigh evidence, except to the extent necessary to determine if there is substantial evidence in support of a verdict); La Montagne v. American Convenience Prods., 750 F.2d at 1410 (although an appellate court weighs the evidence to determine if it is substantial, it does "not weigh the evidence as a jury would, attempting to find a preponderance on one side or the other").

61. 530 U.S.133 (2000).

62. By this holding, the Court resolved a conflict among the circuit courts of appeal over whether it was necessary to review only the evidence supporting the verdict or the entire record. *Id.* at 149–50. *See* 1 CHILDRESS & DAVIS, *supra* note 7, § 3.13.

63. 530 U.S. at 150. In support, the Court cited *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge").

64. *See* 530 U.S. at 153 (finding that the appellate court had impermissibly substituted its judgment for that of the jury's). For further analyses of the standard of review applicable to findings of fact by juries, *see, e.g.*, Fleming James, Jr., *Sufficiency of the Evidence and Jury-Control Devices Available Before the Verdict*, 47 VA. L. REV. 218 (1961); Eric Schnapper, *Judges Against Juries) Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237.

65. *See* SCHWARTZ, *supra* note 38, at 633 ("When the courts were confronted with cases involving challenges to the legality of agency acts, they had at their disposition the fully developed law of appellate review of lower courts as well as that governing the respective roles of judge and jury . . . . [I]t was not surprising that the judges proceeded by analogy with the principles that had been constructed by their predecessors in the above-mentioned fields, particularly that of appellate court review."). There are, however, subtle differences in the substantial evidence test as applied in the administrative law context that take into account the standard of proof required to prevail in agency tribunals. 2 CHILDRESS & DAVIS, *supra* note 7, § 9.03, at 9–13.

weigh the evidence[66] or substitute its judgment for that of the agency,[67] a federal court[68] will review the administrative record to determine if there is substantial evidence to support the agency's findings.[69] Substantial evidence is defined as "such relevant evidence as a *reasonable mind* might accept to support a conclusion."[70] Thus, like the jury standard of review from which it is derived, the "flip side" of the substantial evidence requirement in administrative law cases is a reasonableness requirement. Although the substantial evidence test accords "great deference" to an agency's determination of facts, the reviewing court must do more than act as a "rubber stamp."[71]

2. Findings of Fact by Federal District Courts: The Clearly Erroneous Standard of Review

In contrast to the substantial deference accorded to findings of fact by a jury or an administrative agency on appeal, the factual findings of a federal

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66. A determination of the weight of the evidence is the responsibility of the agency. St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51 (1986).

67. Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951) (even as to matters not requiring administrative expertise, the court may not displace the agency's choice between "two fairly conflicting views"); Sims v. Barnhart, 309 F.3d 424, 428 (7th Cir. 2002) (court may not substitute its judgment for the agency's by reconsidering facts, re-weighing evidence, or resolving disputes of fact).

68. Depending on the applicable statute, the federal reviewing court of first instance may be either a district court or a federal appellate court.

69. Section 706(1)(2)(E) of the APA specifically provides that the reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence . . ." In making its determination, the court must review the whole record or those parts of it cited by a party. Universal Camera Corp. v. NLRB, 340 U.S. at 488. *See also* 2 CHILDRESS & DAVIS, *supra* note 7, § 14.01, at 14–5 (stating that the most frequent standard of review for administrative fact findings of all types is "substantial evidence on the record as a whole"). The "arbitrary and capricious" standard of review in APA § 706(2)(a) applies in general to agency fact findings and policy choices in informal administrative proceedings. Davis, *A Basic Guide*, *supra* note 15, at 479.

70. Consol. Edison Co. of New York v. NLRB, 305 U.S. 197, 229 (1938) (emphasis added); Sims v. Barnhart, 309 F.3d at 428 ("Evidence is substantial when it is sufficient for a reasonable person to conclude that the evidence supports the decision."). The substantiality determination is based on the whole record, including the evidence opposed to the agency's position. Universal Camera Corp. v. NLRB, 340 U.S. at 488. To be substantial, the evidence must be more than a mere scintilla. Dickinson v. Zurko, 527 U.S 150, 162 (1999); Scott v. Barnhart, 297 F.3d 589, 593 (7th Cir. 2001). *See supra* notes 58–59 and accompanying text.

71. Dickinson v. Zurko, 527 U.S. at 162; Scott v. Barnhart, 297 F.3d at 593. *See also* Universal Camera Corp. v. NRLB, 340 U.S. at 490 (Congress has imposed on the courts the responsibility for assuring that an agency "keeps within reasonable bounds").

district court judge are treated with somewhat less deference[72] and are reversed if they are "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure.[73] The meaning and scope of the term "clearly erroneous" have at times been the subject of intensive debate.[74] In *United States v. United States Gypsum Co.*,[75] the Supreme Court attempted to amplify the plain language of Rule 52(a) by explaining that "a finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a

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72. *See* Edward H. Cooper, *Civil Rule 52(a): Rationing and Rationalizing the Resources of Appellate Review*, 65 NOTRE DAME L. REV. 645, 650 (1988) (the findings of trial court judges are given "somewhat less deference" than findings of a jury).

73. FED. R. CIV. P. 52(a). Rule 52(a) states in relevant part:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon . . . . Findings of fact, *whether based on oral or documentary evidence*, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

Id. (emphasis added). The italicized language in the quotation was added by amendment in 1985 to resolve the dispute over the validity of the "documentary evidence" exception that many federal appellate courts had grafted onto the clearly erroneous rule. *See infra* note 91 and accompanying text.

74. *See, e.g.*, Brennan, *supra* note 15, at 398–403; Ellen E. Sward, *Appellate Review of Judicial Fact-Finding*, 40 U. KAN. L. REV. 1, 39–40 (1991). Some of the confusion and debate over the scope and application of the clearly erroneous rule has been attributed to the historical origins of Rule 52(a), which date back to the split between courts of law and courts of equity. *See* Judge John F. Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts — Is the "Clearly Erroneous Rule" Being Avoided?*, 59 WASH. U. L.Q. 409, 411–13 (1981). For a recap of the history of the promulgation of the clearly erroneous rule, see Charles Richard Calleros, *Title VII and Rule 52(a): Standards of Appellate Review in Disparate Treatment Cases) Limiting the Reach of Pullman-Standard v. Swint*, 58 TUL. L. REV. 403, 409–412 (1983); Clark & Stone, *supra* note 50, at 193; Cooper, *supra* note 72, at 647–649; Nangle, *supra*, at 411–413; Sward, *supra*, at 18–20. The equitable roots of Rule 52(a) were recognized by the Supreme Court in *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

75. 333 U.S. 364 (1948). *Gypsum* has been repeatedly cited by the Supreme Court over the years. *See, e.g.*, Easley v. Cromartie, 532 U.S. 234, 242 (2001); Concrete Pipe & Products, Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602, 623 (1993); Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1984); Pullman-Standard v. Swint, 456 U.S. 273, 284 n. 14 (1982); Zenith Radio Corp. v. Hazeltine Research Inc., 395 U.S. 100, 123 (1969). Some commentators have criticized the Court's attempt to elaborate on or explain the supposed plain meaning of the term "clearly erroneous." *See* Nangle, *supra* note 74, at 415. *Cf.* United States v. Alum. Co. of Am., 148 F.2d 416, 433 (2d Cir. 1945) (Learned Hand, J.) (finding it "idle" to attempt to define "clearly erroneous").

mistake has been committed."[76] In *Anderson v. City of Bessemer City*,[77] the Supreme Court further observed:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from the facts.[78]

The authority of a federal appellate court when reviewing trial court findings of fact is therefore circumscribed by the deference the court must give to the trial court's determination.[79]

The amount or degree of that deference has been described by the Supreme Court in different ways.[80] In *Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*,[81] for example, the Court stated that the standard is "significantly deferential." Elsewhere, the Court has described the clearly erroneous rule as a "presumption of correctness"[82] and has stated that the rule means the appellate court must place "primary weight" on the trial

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76. *Gypsum*, 333 U.S. at 395.

77. 470 U.S. 564.

78. 470 U.S. at 573–574 (citations omitted). *See also* Inwood Lab., Inc. v. Ives Lab., Inc., 456 U.S. 844, 857 (1982) (appellate court cannot substitute its interpretation for that of trial court simply because the reviewer might construe the facts or resolve ambiguities differently).

79. Zenith Radio Corp. v. Hazeltine Research Inc., 395 U.S. at 123 (adding that appellate court's function is not to decide issues of fact *de novo*).

80. The federal courts of appeal have developed a variety of other explanations and sub-tests under Rule 52(a), although the helpfulness and accuracy of many of them have been questioned. *See* 1 CHILDRESS & DAVIS, *supra* note 7, § 2.06. A widely quoted example comes from *Parts & Electric Motors, Inc. v. Sterling Electric Inc.*, 866 F.2d 228, 233 (7th Cir. 1988), in which the court stated that "[t]o be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish . . . ." The Seventh Circuit has since backed away from the potential ramifications of this characterization of Rule 52(a). *See* Carr v. Allison Gas Turbine Div., 32 F.3d 1007, 1008 (7th Cir. 1994) (in spite of "colorful language" in prior decisions, the clearly erroneous test does not impose an insuperable burden on appellant); Santa Fe Pac. Corp. v. Central States, S.E. & S.W. Areas Pension Fund, 22 F.3d 725 (7th Cir. 1994) (despite the possible impression conveyed by the dead fish language, the clearly erroneous rule is not a rubberstamp). Professors Childress and Davis contend that the dead fish test is "probably unhelpful, arguably wrong, and likely a fluke of rhetoric." 1 CHILDRESS & DAVIS, *supra* note 7, § 2.06, at 2–34 (the dead fish test "should be left to flounder").

81. 508 U.S. 602, 623 (1993).

82. Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 500 (1984).

court's factual conclusions.[83] The Court has also observed that, in practice, the clearly erroneous standard of review requires an appellate court to affirm "any district court determination that falls within a broad range of permissible conclusions."[84]

Although the above explanations of the meaning and scope of "clearly erroneous" are strongly reminiscent of the Court's descriptions of the substantial evidence rule applicable to jury verdicts and administrative agency findings of fact,[85] the clearly erroneous and substantial evidence rules are not coterminous.[86] Thus, a finding of fact may be supported by substantial evidence[87] and still be clearly erroneous.[88] Put another way, the clearly

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83. Comm'r of Internal Revenue v. Duberstein, 363 U.S. 278, 289 (1960). *See also* Amadeo v. Zant, 486 U.S. 214, 223 (1988) (Court has stressed that the clearly erroneous review standard is a "deferential one"). Deferential review does not mean, however, that the appellate court acts as a "rubber stamp." Cook v. City of Chicago, 192 F.3d 693, 697 (7th Cir. 1999); Santa Fe Pac. Corp. v. Central States, S.E. & S.W. Areas Pension Fund, 22 F.3d at 726. *See also* Carr v. Allison Gas Turbine Div., 32 F.3d at 1008 (appellate court scrutiny of district court fact findings is deferential, but "not abject").

84. Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 400 (1990).

85. *See supra* Part I.C.1.

86. *See, e.g.*,1 CHILDRESS & DAVIS, *supra* note 7, § 2.07 (discussing confusion between two standards and noting that facts supported by substantial evidence may nevertheless leave an overall conviction of mistake); Brennan, *supra* note 15, at 396 (given the history of Rule 52(a), the inference is compelling that clearly erroneous is a broader standard than substantial evidence); Calleros, *supra* note 74, at n. 40 (analytical distinction between two standards exists and practical difference should also be recognized); Davis, *A Basic Guide*, *supra* note 15, at 476 (cases stating that findings supported by substantial evidence cannot be clearly erroneous are "simply wrong"). Despite the analytical differences between the clearly erroneous and substantial evidence standards, many have questioned whether there is any significant practical difference. *See, e.g.*, Johnson v. Trigg, 28 F.3d 639, 643 (7th Cir. 1994) (Posner, J.) (expressing suspicion that the verbal distinctions between the forms of deferential review have little consequence in practice and suggesting that there are only two standards: deferential and plenary review); Carrington, *Power of District Judges*, *supra* note 21, at 520 (difference between the clearly erroneous and substantial evidence test is "insubstantial"); Louis, *supra* note 21, at 1002 (differences, if any, between the deferential standards of review are "slight and incapable of precise articulation"); Stephen A. Weiner, *The Civil Non-Jury Trial and the Law-Fact Distinction*, 55 CALIF. L. REV. 1020, 1024 n. 33 (1967) (debatable whether differences in terminology are very meaningful as a practical matter). *But see* 1 CHILDRESS & DAVIS, *supra* note 7, § 2.07, at 2–37 (important distinctions between two standards should remain); Calleros, *supra* note 74, at n. 40 (practical difference between substantial evidence and clearly erroneous rule should be recognized).

87. A finding of fact that is not supported by substantial evidence will also be clearly erroneous. *See, e.g.*, 1 CHILDRESS & DAVIS, *supra* note 7, § 2.07, at 2–35 to 2–36; Nangle, *supra* note 74, at 419.

88. *See, e.g.*, Concrete Pipe & Products, Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602, 623 (1960) (review under the clearly erroneous standard is "significantly deferential," while review under the substantial evidence or reasonableness standard is "even more deferential"); Carr v. Allison Gas Turbine Div., 32 F. 3d 1007, 1008 (7th Cir. 1994) (to overturn a finding

erroneous standard of review is less deferential than the substantial evidence rule in some unquantifiable degree.

The clearly erroneous rule does not shield findings of fact that rest on erroneous interpretations of the law.[89] So-called "constitutional facts" may also be subject to a less deferential standard of review.[90] The Supreme Court has now made clear, however, that findings of fact based solely on documentary evidence are subject to Rule 52(a)'s deferential standard of review, and Rule 52(a) has itself been amended to codify that principle.[91] The Court has also applied the clearly erroneous standard to factual inferences[92] and certain ultimate facts.[93] But the question whether the clearly erroneous standard applies to all, or even most, ultimate facts and mixed questions of fact and law in the federal court system remains open, as discussed in Part II of this article.

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of fact under the clearly erroneous rule, it is not necessary to conclude that the finding meets the "no reasonable" person standard described in *Concrete Pipe*); Case v. Morrisette, 475 F.2d 1300, 1307 (D.C. Cir. 1973) (a finding of fact is clearly erroneous if without substantial evidentiary support; "beyond that" a finding is clearly erroneous even if supported by evidence, if the reviewer has the "definite and firm conviction" that a mistake has been made). *But see* 1 CHILDRESS & DAVIS, *supra* note 7, § 3.07, at 2–37 (concluding that the clearly erroneous and substantial evidence tests are moving closer where conflicts over the credibility of the evidence are in issue).

89. *See, e.g.*, Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986) (if appellate court believed district court misapplied law to facts, it could have reversed on that basis); Pullman-Standard v. Swint, 456 U.S. 273, 287 n. 14 (1982) (if district court findings rest on erroneous view of law, Rule 52(a) does not apply and findings may be set aside); United States v. Singer Mfg. Co., 374 U.S. 174, 194 (1948) (to the extent a conclusion results from the application of an improper standard to the facts, it may be corrected as a matter of law).

90. *See infra* note 148 and accompanying text.

91. Anderson v. City of Bessemer City, 470 U.S. 573, 573–574 (1985) (described in the text *supra* at note 77). Prior to *Anderson v. City of Bessemer City* and the 1985 amendments to Rule 52(a), a number of courts had by-passed the clearly erroneous rule and reviewed findings of fact *de novo* when the findings were based solely on undisputed facts or documentary evidence. *See, e.g.*, Swanson v. Baker Indus., Inc., 615 F.2d 479, 483 (8th Cir. 1980); Orvis v. Higgins, 180 F.2d 537 (2d Cir. 1950). In part, this "documentary evidence" exception reflected the practice in equity prior to the adoption of Rule 52(a), but the rationale for continuing the practice was that appellate courts were equally competent to draw inferences from written evidence such as admissions or documents as were the trial courts. *See, e.g.*, Brennan, *supra* note 15, at 397 (noting that cases relying on undisputed or documentary evidence are akin to earlier cases in equity); Sward, *supra* note 74, at 40 (describing the equal competency rationale).

92. *See* Childress, *A 1995 Primer*, *supra* note 15, at 129 (*Swint*, 456 U.S. at 287, indicates strongly that factual inferences in general are reviewed under the clearly erroneous standard).

93. *See infra* at notes 101–112 and accompanying text.

II. DEFINITIONAL AND FUNCTIONAL APPROACHES TO MIXED QUESTIONS OF FACT AND LAW: FEDERAL COURTS GRAVITATE TO THE LATTER

A. The Limitations of the Fact/Law Distinction

The general rule that conclusions of law are reviewed freely on appeal, while conclusions of fact receive varying degrees of deference, presents a seemingly simple and straightforward dichotomy. Both analytically and in practice, however, the distinction between "fact" and "law" is far from clear cut.[94] Instead of a dichotomy, therefore, the concepts of fact and law are more accurately viewed as a continuum[95] on which the issues at each end are more or less clearly delineated, but the proper identity of those in the middle quickly becomes blurry.

At one end of the continuum are what are often referred to as "pure," "basic," or "historical" facts.[96] These tend to be facts of the "who, what, where, why, and when" variety, such as the weather conditions on the date of an accident or the identity of witnesses to a will.[97] At the other end of the continuum are "pure" questions of law, such as the constitutionality of a statute or the correct choice between two conflicting legal rules.[98]

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94. *See, e.g.*, Thompson v. Keohane, 516 U.S. 99, 110 (1995) (proper characterization of question as one of fact or law is "sometimes slippery"); Miller v. Fenton, 474 U.S. 104, 113 (1985) (appropriate methodology to distinguish questions of fact and law "has been, to say the least, elusive"). In a very recent addition to the extensive literature discussing the analytical distinction between "fact" and "law," Professors Allen and Pardo argue that there is none. Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769 (2003). Rather than a distinct ontological or qualitative category, questions of "law" are, in their view, "part of the more general category of factual questions." *Id.* at 1770.

95. *See, e.g.*, Steven A. Childress, *Constitutional Fact and Process: A First Amendment Model of Censorial Discretion*, 70 TUL. L. REV. 1229, 1310 (1996) [hereinafter Childress, *Constitutional Fact*]; Calleros, *supra* note 74, at 412; Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 233 (1985). *See also* Sward, *supra* note 74, at 11 (distinguishing fact from law is "notoriously difficult" and law and fact are frequently intertwined). *But see* Allen & Pardo, *supra* note 94, at 1801 (to the extent there is a continuum, legal facts are at one end and non-legal facts are at the other).

96. *See, e.g.*, Thompson v. Keohane, 516 U.S. at 110 (under 28 U.S.C. § 2254(d) governing federal habeas corpus proceedings, the statutory reference to "facts" means "basic, primary or historical facts"); Louis, *supra* note 21, at n.3 (discussing definitions of "historical fact"); *infra* note 118.

97. In *Brown v. Allen*, 344 U.S. 443, 506 (1953), Justice Frankfurter explained basic facts as referring to "a recital of external events and the credibility of their narrators."

98. *See supra* Part I.B.

On the factual end of the continuum, simple factual inferences based on circumstantial evidence are also "facts." For example, there may be no direct testimony at trial from witnesses who observed that a traffic light was green at the time of an accident. However, if witnesses testify that all of the cars stopped in traffic in the right lane began simultaneously to move forward just before a collision, and no person was present in the intersection directing traffic, a fact finder would be justified in inferring from this circumstantial evidence that the traffic light had turned green. Simple factual inferences of this type are generally considered solidly within the province of the original fact finder.[99]

The classification and treatment of factual inferences quickly becomes more confusing and controversial, however, when basic facts and simple inferences blend into and become part of a finding of "ultimate facts" or "mixed questions of fact and law."[100] The Supreme Court may have helped to generate some of the confusion in this regard by its language and reasoning in the oft-quoted *Pullman-Standard v. Swint* case.[101] In that case, the Court seemed at times to distinguish ultimate facts from mixed questions of fact and law. At other times, it equated the two.

The issue on appeal in *Swint* was whether a union seniority system had been adopted with the intent to discriminate on the basis of race and color.[102] Applying a multi-factor test from a Fifth Circuit case,[103] the district court found that any differences in the terms, conditions, or privileges of employment arising from the seniority system did not result from an intent to discriminate.[104] In reversing the district court's judgment on appeal, the Fifth Circuit reached the opposite conclusion with regard to each of the principal factors determined

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99. *See, e.g.*, Comm'r v. Duberstein, 363 U.S. at 291 (clearly erroneous rule applies to factual inferences from undisputed basic facts). *See also* Pullman-Standard v. Swint, 456 U.S. at 287 (Rule 52(a) does not divide facts into categories).

100. Ultimate facts have been defined as "simply the result reached by processes of legal reasoning from, or the interpretation of the legal significance of, the evidentiary facts." Bullock v. Tamiami Trail Tours, Inc., 266 F.2d 326, 330 (5th Cir. 1959). *See also* Foy v. First Nat'l Bank, 868 F.2d 251, 254 (5th cir. 1989) (ultimate facts involve "the application of a legal standard to the lay person's idea of 'the facts of the case'"). *But see* Sward, *supra* note 74, at 29 (ultimate fact is a "factual conclusion, drawn from subsidiary facts, to which a legal consequence applies"). The most frequently quoted definition of mixed questions of fact and law comes from *Pullman-Standard v. Swint*, 456 U.S. at 288. See *infra* note 119. Despite the confusing explanation in *Swint*, many ultimate facts appear to be either coterminous with or a subset of mixed questions of fact and law, as traditionally defined. *See infra* notes 112–119 and accompanying text.

101. 456 U.S. 273.

102. *Id.* at 275.

103. James v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1997).

104. *Id.* at 275.

by the district court and held that there was "no doubt" that a discriminatory purpose existed.[105]

The Supreme Court reversed the appellate court's decision, agreeing with the petitioners that the appellate court had erroneously made an independent determination of the existence of a discriminatory purpose.[106] The Court first observed that Rule 52(a)

> does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.[107]

In several passages, the Court then attempted to distinguish findings of discriminatory intent from "mixed questions" of fact and law. At one point, the Court stated flatly that the question of whether the differential impact of the seniority system reflected discriminatory intent was *not* a mixed question of fact and law.[108] A few passages later, however, the Court asserted that the presence of discriminatory intent is not "a mixed question of law and fact *of the kind that in some cases* may allow an appellate court to review the facts to see if they satisfy some legal concept of discriminatory intent."[109] The

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105. *Id*. at 277, 282–85. The standard of review applied by the Fifth Circuit in *Swint* was somewhat confusing. After stating that it was left with "the definite and firm conviction that a mistake" had been made, the court referred to FED. R. CIV. P. 52(a) in a footnote and quoted language from *East v. Romine, Inc.*, 518 F.2d 332, 339 (5th Cir. 1975). *Romine* had characterized the existence or non–existence of discrimination as "essentially a question of fact. But *Romine* also characterized the issue of discriminatory intent as "a question of "ultimate fact" because it is the "ultimate issue for resolution" under Title VII. *Id.* The *Romine* court then stated that in reviewing district court findings it would make an independent determination of allegations of discrimination, although it conceded that it was bound by findings of "subsidiary fact" that were not clearly erroneous. *Id*. at 533 n. 6; 456 U.S. at 285.

106. 456 U.S. at 285–86.

107. *Id.* at 287. The Court was responding to opinions from the Fifth Circuit such as *Romine*, 518 F.2d 332, that reviewed subsidiary facts deferentially and "ultimate facts" *de novo*.

108. 456 U.S. at 287–88.

109. *Id.* at 289 (emphasis added). The Court was arguably conceding in the quoted passage that discriminatory intent *was* a type of mixed question of fact and law, but not one that lent itself to non-deferential review. At a minimum, the Court seemed to indicate that at least some "ultimate" facts would be considered mixed questions of fact and law. *See* Calleros, *supra* note 74, at 437 (*Swint* case should not be applied automatically to every finding of discriminatory intent). The overlapping nature of mixed questions and ultimate facts is also indicated in footnote 16 to the *Swint* opinion, in which the Court referred to the Fifth Circuit's tendency to treat ultimate facts as "only another way of stating a standard of review with respect to mixed questions of law and fact." Acknowledging that the Supreme Court had itself treated "ultimate facts" as independently reviewable in *Baumgartner v. United States*,

Court then went on to say that discriminatory intent under Title VII "means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive."[110] Referring to the issue of discriminatory intent at other points in the opinion as ultimately one of "pure fact," the Court held that the district court's findings on discriminatory intent could only be reversed if clearly erroneous.[111]

Notwithstanding the Court's confusing and somewhat contradictory explanation in *Swint*, "ultimate facts" appear to be questions of "pure fact" or are otherwise treated deferentially primarily because the courts elect to place them on the fact, rather than the law,[112] side of the continuum for standard of review purposes.[113] In other words, the federal courts have not developed a

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322 U.S. 665 (1944), the Court concluded that *Baumgartner* "did not mean that whenever the result in a case turns on a factual finding, an appellate court need not remain within the constraints of Rule 52(a)." 456 U.S. at 286 n. 16. Rather, the Court said, *Baumgartner*'s discussion of ultimate facts referred to "findings that 'clearly impl[y] the application of standards of law.'" *Id.* Because the Court found that the discriminatory intent issue in *Swint* was a question of "pure fact," *Baumgartner* was not applicable. *Id.*

110. 456 U.S. at 289–290. Professors Childress and Davis have interpreted the intent question in *Swint* as being "in the nature of a fact conclusion (*e.g.*, Mary did A, B, and C; therefore, Mary intended D)." 2 CHILDRESS & DAVIS, *supra* note 7, § 7.05, at 7–40. Under this view, intent is not a mixed question because it does not necessarily require the application of law. *Id.* Put another way, intent is "a fact question *preliminary to* the application of law to the fact of intent rather than involving some legal definition of intent." *Id.* (emphasis supplied). To the extent that the Court in *Swint* was saying that discriminatory intent means actual intent, without reference to legal principles, the application of a deferential standard of review is consistent with the treatment of other findings of "fact" and seems non-controversial. Whether the intent question in *Swint* truly was independent of any reference to legal principles is, however, debatable. *See infra* note 112. Moreover, the term "ultimate fact" is often used broadly to characterize questions that involve the application of law to fact. *See supra* note 100; *infra* note 117. Thus, one apparent impact of the *Swint* decision is that any analysis of the standard of review for ultimate facts must specify whether the broad or the narrow definition of "ultimate fact" is applicable.

111. Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982). Later in the opinion, however, the Court stated that "*whether an ultimate fact or not*, discriminatory intent . . . is a factual matter subject to the clearly erroneous rule." *Id.* at 293 (emphasis added).

112. *See supra* note 110. Although the Supreme Court indicated that the appellate court in *Swint* had addressed the issue of discriminatory intent as one of fact "unmixed with legal considerations," 456 U.S. at 286 n. 16, that characterization of the Fifth Circuit's opinion is questionable. *See* Sward, *supra* note 74, at 32 (Fifth Circuit may have thought it was deciding a mixed question that had legal aspects that were uncertain).

113. *See, e.g.*, Weiner, *supra* note 86, at 1022 (because mixed questions cannot be "meaningfully described" as law making or fact finding, terminology is not useful for analysis, and appellate courts may simply affix labels without further comment). *See also* Cooper, *supra* note 72, at 658 (courts "adhere to the fiction that all determinations are reviewed either as if rulings of law or as if findings of fact"). Professors Allen and Pardo contend that the *only* distinction between the categories of law, fact and mixed questions is allocative, not analytic. Allen & Pardo, *supra* note 94, at 1805–06.

different or intermediate standard of review for a widely recognized third category of issues that involve both factual and legal components.[114] Thus, courts adhering to the traditional linguistic categories to determine the applicable standard of review must ultimately choose to treat "grey" mixed questions as either "black" issues of "fact," subject to deferential standards of review, or "white" issues of "law," subject to *de novo* review.

The Supreme Court acknowledged the difficulties of this process of categorization in *Swint* when it observed:

> The Court has previously noted the vexing nature of the distinction between questions of fact and questions of law. Rule 52(a) does not furnish particular guidance with respect to distinguishing law from fact. Nor do we yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion.[115]

This "vexing nature" of the law-fact distinction is sometimes reflected in disagreements over what term and definition to use to characterize questions that involve elements of both fact and law, as illustrated in *Swint* itself. It is also reflected in the continuing inability of the appellate courts, as well as the Supreme Court, to agree on a rule or principle for determining what standard of review to apply to questions that involve elements of both fact and law.[116]

Nevertheless, most commentators now agree that there is a third category of legal issues variously called ultimate facts,[117] law application,[118] or mixed

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114. *See, e.g.*, Cooper, *supra* note 72, at 658 ("obvious response" to law application process would be to create a third and "presumably intermediate" standard of review); Louis, *supra* note 21, at 998 (mixed questions "might justify a third or intermediate scope of review"). Illinois courts seem to be following this approach by reviewing at least some mixed questions under what is, for the state courts, a new and different intermediate standard of review. *See infra* Part IV.

115. Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982).

116. *See, e.g.*, Louis, *supra* note 21, at 1003 ("division of power over mixed questions has been neither simple nor consistent, even though the process of law application itself does not vary from one context or venue to another"). *See infra* Part II.C.

117. For example, Professor Louis equates "ultimate facts" with the application of law to fact and mixed questions. Louis, *supra* note 21, at 993, 1002. He generally uses the term "ultimate fact" to refer to all three concepts and characterizes them as neither "fact" nor "law," but rather "intermediate adjudicative determinations that combine elements of fact and law." *Id.* at 1002.

118. Professor Monaghan notes that the law/fact distinction is used to describe three different functions: "law declaration, fact identification, and law application." Monaghan, *supra* note 95, at 234. The law declaration function leads to propositions that are general in character, whereas fact identification is a case-specific inquiry into what happened that does not significantly implicate legal principles. *Id.* at 235. Professor Monaghan describes law application as "residual in character" and states that it involves relating legal standards of

questions of fact and law.[119] Moreover, in determining what standard of review to apply to this third category (referred to generically in this article as "mixed questions" or "mixed questions of fact and law"), the federal courts and commentators are increasingly employing a functional or policy-oriented analysis to support their choice.[120] The following section summarizes the functional considerations that have traditionally been applied to explain the allocation of responsibility to declare "law" and to find "facts" in the federal judicial system. Part II.C. then discusses the ways in which these functional considerations have been used to analyze the appropriate standard of review for mixed questions.

B. The Functional or Policy Oriented Approach to Selecting Federal Standards of Review

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conduct to evidentiary facts. *Id.* at 236. By Professor Monaghan's definition, law application is "situation-specific" and does not involve the "generalizing feature of law declaration." *Id.* *See also* Cooper, *supra* note 72, at 657–58 (in addition to findings of fact and questions of law, it is now common to recognize a third category called "law application" that shares characteristics of fact-finding and law-making); Weiner, *supra* note 86, at 1022 (many trial court determinations involve neither reconstruction of past events/conditions nor declaration of broad principles, but rather fall into a third category of "law application" in which the court relates the governing legal standard to historical facts). *But see* Allen & Pardo, *supra* note 94, at 1806 (law application, like "law," is *part of* the category of "facts").

119. For example, Professor Davis characterizes the law/fact distinction as "a spectral problem of law, fact, and mixed questions of fact and law, plus the possibility of a discretionary decision." Davis, *A Basic Guide*, *supra* note 15, at 472. She describes mixed questions as those that involve the application of law to fact. *Id.* at 474. *See also* Christie, *supra* note 48, at 14 (courts traditionally distinguish among questions of law, questions of fact, and mixed questions of law and fact). The term "mixed question" is also used frequently by the Supreme Court, which generally recites the definition from *Pullman-Standard v. Swint* that mixed questions of law and fact are "questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." 456 U.S. at 290 n.19 (1982). *See also* Suzy's Zoo v. Commissioner, 273 F.3d 875, 877 (9th Cir. 2001) ("A mixed question of law exists when primary facts are undisputed and ultimate inferences and legal consequences are in dispute").

120. *See, e.g.*, Louis, *supra* note 21, at 1007 (policy-oriented approach to mixed questions is superior); Monaghan, *supra* note 95, at 237 ("real issue" in treatment of mixed questions is allocative, not analytic); *see infra* Part II.C. *See also* Allen & Pardo, *supra* note 94. Because the institutional factors are essentially the same (although they may carry different weight), Part II draws at times on criminal, as well as civil, cases.

The principal policy considerations taken into account by the federal appellate courts in determining the optimal degree of deference to be accorded to the tribunal below can be broken down into three broad, often overlapping factors: comparative expertise, resource allocation, and considerations of fairness.[121] These factors have in turn been boiled down in many cases to the single question of which decision-maker is better positioned to assume the ultimate power of decision over a particular issue.[122]

In explaining the allocation of power and responsibility in the federal judicial system, the policy consideration of perhaps the greatest longevity and emphasis is the original fact-finder's superior ability to make credibility determinations. In *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, for example, the Supreme Court noted that Federal Rule 52(a) is based on the "unique opportunity" given to the trial court judge to evaluate witnesses' credibility and weigh the evidence.[123] The Supreme Court has also observed that the fact finder in the "usual case" is in a better position to make judgments about the reliability of evidence than is a reviewer acting solely on basis of a written record.[124] As the "most obvious example," the Court pointed to the fact finder's ability to evaluate the credibility of live witnesses.[125]

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121. For other functional and policy considerations that influence the choice of standards of review, see *infra* notes 127 and 136. For an extensive discussion of the various policies and rationales underlying the choice of standard of review, see Sward, *supra* note 74. *See also* Cooper, *supra* note 72, at 649–657 (discussing the institutional factors that affect the allocation of responsibility between trial and appellate courts and noting that these factors change over time and vary from one case to another).

122. Miller v. Fenton, 474 U.S. 104, 114 (1985) (fact/law distinction has at times turned on a determination of whether one judicial actor is better positioned to decide an issue). *See also* Pierce v. Underwood, 487 U.S. 552, 559–63 (1988) (analyzing which judicial actor is best positioned to determine whether attorneys fees should be awarded under federal statute).

123. 456 U.S. 844, 855 (1982). *See also* Salve Regina Coll. v. Russell, 499 U.S. 225, 233 (1991) (Rule 52(a) defers to the trial judge's "unchallenged fact-finding ability"). Commentators have, however, questioned the degree to which trial judges and juries can accurately judge a witness's credibility. *See, e.g.*, Cooper, *supra* note 72, at 650 (finding "room to wonder" whether the ability to observe demeanor enhances fact finding); Sward, *supra* note 74, at 20–21 (questioning common belief that opportunity to observe demeanor makes fact finder more competent to judge credibility).

124. Concrete Pipe and Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602, 623 (1993). *See also* Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 402 (1990) (issues involving credibility are normally treated as factual matters); Calleros, *supra* note 74, at 419 (trial court's general advantage over appellate court in making findings of historical fact is greatest when findings are based on evaluation of credibility of witnesses who have given conflicting testimony before the judge).

125. *Concrete Pipe*, 508 U.S. at 623. In *Anderson v. City of Bessemer City*, the Supreme Court indicated that the deferential "clearly erroneous" standard of review under Rule 52(a) requires even greater deference when a trial court's findings of fact are based on credibility determinations. 470 U.S. 564, 575 (1985). Explaining the reasons for this greater deference,

On other occasions, however, the Supreme Court has indicated that the ability to make credibility determinations is not the only justification for delegating fact finding responsibility to the original fact finder. In *Anderson v. City of Bessemer City*, for example, the Supreme Court observed that the rationale for deferring to a district court's finding of fact is not limited to the trial judge's superior ability to make credibility determinations:[126] experience gathered in fulfilling the trial judge's central role as fact finder leads to fact-finding "expertise" generally.[127]

In contrast to the functional considerations governing fact finding, the Ninth Circuit Court of Appeals, in a widely cited decision, has identified several structural advantages that appellate courts enjoy over trial courts in deciding questions of law.[128] First, appellate judges are better able to concentrate on legal questions because they are not required to perform the time-consuming

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the Court noted that "only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Id.* The Court added, however, that factors other than demeanor and inflection may affect the decision whether to believe a witness, such as the existence of documents or objective evidence that contradicts the witness's testimony. A trial judge therefore cannot "insulate" findings of fact from appellate review simply by labeling them credibility determinations. *Id. See also supra* note 123.

126. Professor Sward suggests that competency considerations do not always weigh strongly in favor of trial judges. For example, a panel of appellate judges may be more competent than a single trial judge to bring to bear a common human understanding to the process of finding facts. Sward, *supra* note 74, at 21. Appellate judges on specialized courts such as the Federal Circuit may also have a deeper understanding of specialized facts than a single trial judge. *See id.* at 22.

127. 470 U.S. at 574; Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986) (quoting *Bessemer City* with approval). In cases discussing the standard of review for discretionary decisions that involve significant factual components, the Supreme Court has also pointed to various functional advantages of trial courts that extend beyond their superior ability to make credibility determinations. In *Buford v. United States*, 532 U.S. 59, 64–65 (2001), for example, the Court found that district judges are better positioned than appellate judges to determine whether prior convictions should be consolidated for purposes of applying federal sentencing guidelines because they are more familiar with trial and sentencing practices and with relevant state and federal procedures. In addition, district judges are more familiar with case-specific factual details and nuances, on which "legal results" in sentencing decisions depend heavily. *Id.* at 65. *See also Cooter*, 496 U.S. at 402 (trial court is better situated than reviewing court to marshal facts relevant to the imposition of sanctions under FED. R.CIV. P. 11 because it is familiar with the issues and litigants); *Pierce*, 487 U.S. at 560 (by participating in settlement conferences and other pretrial activities, trial court may have insights not conveyed by the record into matters such as reliability of particular evidence); Cone v. W. Va. Pulp & Paper Co., 330 U.S. 212, 216 (1947) (trial judge has "feel" for case that no printed transcript on appeal can convey).

128. United States v. McConney, 728 F.2d 1195, 1201 (9th Cir. 1982). In addressing the proper function of appellate courts, Professor Wright observed that there is universal agreement that one function is "to discover and declare — or to make — law." Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 779 (1956–1957).

process of hearing evidence.[129] Second, appellate panels of at least three judges hear every case, bringing to bear a collaborative, deliberative process that reduces the risk of judicial error on questions of law.[130] Third, appellate decisions become controlling precedent under the doctrine of *stare decisis* and affect rights of future litigants, whereas rulings on factual issues usually concern only the immediate parties to a case.[131] "Sound judicial administration" therefore supports a concentration of appellate resources on ensuring that legal determinations are correct.[132]

Related to considerations of competency and expertise are issues of resource allocation designed to ensure that each actor in the judicial system has the optimal setting in which to perform its predominant function. As noted above, for example, the fact that federal appellate decisions become controlling precedent affecting rights of future litigants dictates that appellate resources should primarily be directed to the process of ensuring that legal determinations are accurate.[133] In a world of finite judicial resources, the more time that appellate courts spend delving into factual records to review the correctness

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129. *McConney*, 728 F.2d at 1201. In *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991) (holding that district court determinations of state law are reviewed *de novo*), the Supreme Court observed that district judges presiding alone over fast moving trials must necessarily devote much of their energy and resources to evidentiary matters. Burdened by the logistics of trial advocacy, trial counsel is also hampered in its ability to supplement judicial research into legal issues. Thus, district judges often have to resolve complicated legal questions without the benefit of lengthy reflection or extensive information. *Id.* at 231–32 (quoting Dan T. Coenen, *To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law*, 73 MINN. L. REV. 899, 923 (1989)).

130. *McConney*, 728 F.2d at 1201. The Supreme Court has observed that appellate courts "are structurally suited to the collaborative juridical process that promotes decisional accuracy." *Russell*, 499 U.S. at 232. In addition to the fact that appellate judges are able to devote their primary attention to legal questions, the Court noted that the parties' briefs ordinarily provide more information and analysis on appeal than they do at trial because legal issues become more focused. *Id.* Most importantly, the use of multi-judge appellate panels allows "reflective dialogue and collective judgment." *Id.*

131. Professor Sward has characterized this ability of appellate courts to form binding precedents as a very important functional reason for allocating ultimate power to them to decide legal questions. This allocation promotes fairness by imposing uniform legal principles throughout broad geographic regions and, if the Supreme Court speaks, over the nation as a whole. *See* Sward, *supra* note 74, at 14–15.

132. *Id.* Similar functional advantages seem to support the allocation of primary responsibility for determining legal questions in administrative law cases on the reviewing courts. Here, however, there is a countervailing consideration: administrative agencies frequently bring their own expertise and experience to the process of interpreting the laws they administer. Hence, federal courts have increasingly given deference to administrative agency determinations of law. *See supra* notes 37–45 and accompanying text.

133. Allocating the power to declare law to appellate courts is also efficient because they have broader authority and can resolve an open legal question for an entire region by deciding a single case. *See* Sward, *supra* note 74, at 15.

of fact-finding,[134] the less time they have to spend on their primary law-declaring function.[135]

From the perspective of the judicial system as a whole, moreover, significant additional resources would be required if appellate courts routinely duplicated the trial courts' fact-finding process, even if appellate review was limited to reviewing the transcript of the proceedings below.[136] Thus, the Supreme Court has observed that a policy of giving deference to the original fact finder's conclusions of fact "makes sense because in many circumstances the costs of providing for duplicative proceedings are thought to outweigh the benefits."[137]

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134. Conversely, the time available to trial courts and other primary decision-makers to concentrate on legal questions is more limited given the additional pressures they face in reviewing pleadings, adjudicating discovery disputes, hearing motions, taking evidence, and undertaking the many other tasks involved in administering the pre-trial and trial process. *See supra* note 129.

135. *See, e.g.*, Cooper, *supra* note 72, at 649 (constantly increasing number of appeals requires continual reexamination of balance between appellate courts' law-declaring and corrective functions); Louis, *supra* note 21, at 998 (crowded dockets and "temporal inability" of appellate courts to immerse themselves in every case record necessitate deference to most trial level determinations with substantial factual components). *Cf.* Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 404 (1990) (deference to trial court in determining FED. R. CIV. P. 11 sanctions "will streamline the litigation process by freeing appellate courts from the duty of reweighing evidence and reconsidering facts"). One of the principal concerns advanced by critics of the constitutional fact doctrine, discussed *infra* note 148, is that indiscriminate application of the doctrine to all, or even many, cases involving constitutional issues would overwhelm the dockets of the appellate courts. *See, e.g.*, Monaghan, supra note 95, at 246–247; Adam Hoffman, Note, *Corraling Constitutional Fact: De Novo Fact Review in Federal Appellate Courts*, 50 DUKE L.J. 1427, 1445–56 (2001).

136. Duplicative fact finding at trial and then on appeal would also burden litigants. *See* Anderson v. City of Bessemer City, 470 U.S. 564, 574–575 (1985) (because parties have been required to concentrate energies and resources on persuading a trial judge that their respective factual accounts are correct, forcing them to persuade three more appellate judges "is requiring too much"). *See also* Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 567 (1969) [hereinafter Carrington, *Crowded Dockets*] (describing the economic costs of appeals and the potential risk of eroding rights by extensive use of the process of review). Other commentators have focused on the potential adverse impact of expanded appellate review on the prestige and morale of trial court judges. *See, e.g.*, Nangle, *supra* note 74, at 426–427 (attributing the public's perceived lack of confidence in trial courts primarily to "the increasingly cavalier attitude of appellate courts in reversing trial court decisions" and noting that there has been a consequent lowering of the morale of district court judges). *See also* Carrington, *supra*, at 567 (appellate court must keep in mind the need to preserve dignity and significance of trial court proceeding); Cooper, *supra* note 72, at 652 (deferential scope of review enhances prestige of trial courts and forces parties to take initial trial seriously).

137. Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602, 622 (1993) (adding that the second proceeding would render the first "ultimately useless"). *See also* Pierce v. Underwood, 487 U.S. 552, 560 (1987) (even if trial judge's full knowledge of facts can be

A second consideration that impacts the allocation of resources within the federal appellate system and that may influence decisions as to the applicable standard of review is the pressure on the courts resulting from an apparently ever-increasing caseload.[138] Deferential standards of review that make it more difficult to change the outcome of cases on appeal tend, at least in theory, to reduce the number of appeals and allow appellate courts more time to focus on their law-declaring function in those cases that are appealed.[139]

A countervailing although controversial factor revolves around the appellate courts' corrective function.[140] This factor focuses on the importance of ensuring justice for particular litigants in a particular case.[141] As previously indicated, a system in which reviewing courts duplicate the fact-finding process in every case on appeal in order to correct any factual errors made below may not be cost-effective. On the other hand, a review system that gives complete deference to fact-findings below may lead to an unacceptable number of incorrect decisions and may ultimately undermine the public's faith in the

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acquired by appellate court, that learning process often involves "unusual expense"); Anderson v. City of Bessemer City, 470 U.S. 552, 575 (1985)(duplication of trial judge's efforts on appeal would contribute only negligibly to accuracy of fact determination "at a huge cost in diversion of judicial resources"); Sward, *supra* note 74, at 24 (deferential review of fact finding reflects a judgment that trial courts are sufficiently competent and fair that extensive appellate review would be inefficient, producing little if any change in outcome of cases at great cost). *But see* John C. Godbold, *Fact Finding by Appellate Courts — An Available and Appropriate Power*, 12 Cumb. L. Rev. 365 (1982) (describing a number of instances in which appellate courts properly engage in fact finding).

138. *See, e.g.*, Louis, *supra* note 21, at 998; 1013 (attributing growing deference to fact finders to "the litigation explosion"). Concerns about the impact of the increasing appellate court caseload are long-standing. *See generally* Carrington, *Crowded Dockets*, *supra* note 136 (analyzing the perceived threat to the federal appellate courts' institutional role from a burgeoning case load). Increased numbers of appeals may also increase the workload of the trial courts. *See, e.g.*, Wright, *supra* note 128, at 780 (in addition to time and expense involved in taking appeals themselves, successful appeals that lead to new trials add to burden of over-crowded trial courts, and interlocutory appeals delay cases interminably).

139. *See, e.g.*, Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 404 (1990) (deferential review of FED. R. CIV. P. 11 determinations will "discourage litigants from pursuing marginal appeals, thus reducing the amount of satellite litigation").

140. Appellate courts are free to correct legal errors below. The dispute here relates to the appellate courts' role in correcting factual errors. Sward, *supra* note 74, at 17. For a discussion of the controversy surrounding the appellate courts' corrective function, see Calleros, *supra* note 74, at 421–422 (concluding that "the arguments in favor of at least limited review for correctness are persuasive").

141. Sward, *supra* note 74, at 25. Professor Carrington notes that "[t]he precise accuracy of the fact-finding may be of utmost concern to the litigants, but it is of little general concern to others than the parties if an isolated mistake occurs in the judicial re-creation of events in dispute." Carrington, *Power of District Courts*, *supra* note 21, at 518. He later concedes, however, that even the "purest" factual findings should not be completely immune from appellate review. *Id.* at 519. *See infra* notes 143–144 and accompanying text.

fairness of the judicial system.[142] Moreover, absolute deference would potentially undermine the appellate courts' law-declaring function by allowing the trier of fact to "subvert" the law with hostile findings.[143] The most serious debates over the appropriate standard of review therefore often revolve around disagreements over the relative importance of the appellate courts' corrective function.[144]

The foregoing functional considerations have all been brought to bear on the question of what standard of review should be applied, not only to questions of "pure" law and "pure" fact, but also to mixed questions of fact and law. Although very useful in framing and feeding the discussion and analysis, the functional or policy-oriented factors nevertheless do not inevitably lead to a single, undisputed solution to the "vexing" and "slippery" problem of how to treat mixed questions, as the following section illustrates.

C. Federal Standards of Review for Mixed Questions of Fact Under Functional Analysis

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142. *See* Carrington, *Power of District Courts*, *supra* note 21, at 519 (some "marginal check" on unfairness or lack of skill of trial judge should be supplied "in the interests of litigants and in the public interest in providing them with reasonable satisfaction in the process); Sward, *supra* note 74, at 25–26 (discussing values underlying the appellate courts' corrective function). The importance of providing a mechanism for at least *some* error correction on appeal of findings of fact is reflected in the fact that federal reviewing courts generally do not give absolute deference to decisions below, but rather review for clear error or lack of substantial evidence in support of a fact finder's determination. *See supra* Part I.C. In discussing a related issue, commentators have observed that appellate courts may also quietly give heightened scrutiny to the determinations of particular district judges where experience indicates that their determinations are colored by bias, incompetence or other indicia of untrustworthiness. *E.g.*, Cooper, *supra* note 72, at 655–56 (adding that it is best to trust appellate courts to use their power of searching review in such cases "wisely but surreptitiously").

143. Carrington, *Power of District Judges*, *supra* note 21, at 519. *See also* Cooper, *supra* note 72, at 657 (appellate courts cannot completely avoid the task of ensuring a "plausible fact platform" for declarations of law).

144. *See, e.g.*, Phillips, *supra* note 22, at 2 ("proper" scope of review depends on whether corrective or law-declaring function is deemed more appropriate); Nangle, *supra* note 74, at 427 (commentators often emphasize the law-making function to the exclusion of the corrective function); authorities cited *supra* note 142. *See also* Cooper, *supra* note 72, at 649 (proper balance between the corrective and law-making functions "is not self-evident"). For a discussion of the appellate courts' corrective function in constitutional cases, see Monaghan, *supra* note 95, at 268–270. *See also* Louis, *supra* note 21, at 1027 (for mixed questions that are determinative of constitutional rights "even occasional wrong results are arguably unacceptable" and free appellate review may be justified).

One reason that choosing the proper standard of review for mixed questions is "vexing" is that much is ultimately at stake. As explained by Professors Childress and Davis, if all conclusions containing some legal reasoning are reviewed under a non-deferential standard of review, the trial court's role as fact finder may be usurped.[145] Conversely, "if all conclusions shaded by case facts are called fact, the appellate court may find that in its law-making role it has little left to do; all decisions will be practically finalized at trial."[146]

Some reviewing courts, including the Supreme Court in certain contexts, have utilized a functional analysis to determine which mixed questions will receive deferential review and which will not. Many of the Supreme Court's most extensive policy discussions of the standard of review for mixed questions are contained in decisions raising constitutional issues. Although the balancing of institutional concerns may not lead to the same choice of standard of review in non-constitutional cases, the reasoning of the Supreme Court's decisions nevertheless sheds light on the factors that influence the federal choice of the standard of review for mixed questions generally.

One key factor in the Supreme Court's analysis has been the perceived need for heightened appellate scrutiny of some mixed questions because of their impact on the appellate courts' law declaring function. In *Bose Corp. v.*

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145. 1 CHILDRESS & DAVIS, *supra* note 7, § 2.18, at 2–100. The discussion in this section principally revolves around the standard of review applicable to findings of mixed questions by federal district court judges. Because of constitutional, historical and other factors, juries in federal civil cases are generally allocated the responsibility for applying law to facts, and their resulting determinations are generally reviewed deferentially under the substantial evidence rule. *See* Louis, *supra* note 21, at 996–97 & n. 19 (describing the constitutional, historical and functional considerations that underlie judicial deference to jury determinations of many mixed questions); *supra* notes 51–64 and accompanying text. *See also* 1 CHILDRESS & DAVIS, *supra* note 7, § 3.05, at 3–41 (deferential jury standard of review "usually subsumes any real distinction among facts, inferences, ultimate facts, or mixed law-fact questions"). Nevertheless, some mixed questions are either taken away from the jury initially or are reviewed on appeal under a non-deferential standard. *See* Louis, *supra* note 221, at 1002–04; 1008. *See generally* 1 CHILDRESS & DAVIS, *supra* note 7, § 3.09. Federal courts have also generally reviewed applications of law to facts by administrative agencies under the same deferential standard as agency findings of historical fact. *See, e.g.*, NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 130–131 (1944) (mixed questions are treated with same deference as historical facts); Tellepsen Pipeline Serv. Co. v. NLRB, 320 F.3d 554 (5th Cir. 2003) (court must sustain agency's application of its legal interpretations to facts of particular case when result is supported by substantial evidence based on record as whole). *See generally* Louis, *supra* note 21, at 995 & n.11; 1007–1008; *supra* notes 65–71 and accompanying text. Deferential review of administrative determinations of mixed questions is consistent with the federal trend toward giving deference to administrative determinations of questions of law under the *Chevron* doctrine. *See* notes 40–44 and accompanying text.

146. 1 CHILDRESS & DAVIS, *supra* note 7, § 2.18, at 2–100 to 2–101.

Consumers Union,[147] for example, the Supreme Court emphasized the importance of its law-declaring function when it held that a trial court's determination that a defendant in a defamation case acted with "actual malice" would be reviewed *de novo* rather than under the deferential clearly erroneous rule.[148] Without clearly indicating whether it was treating the presence of actual malice as an "ultimate fact" of the type found in *Swint* or as a mixed question,[149] the Court in *Bose* emphasized the extent to which some apparent findings of "fact" implicate the Court's law-declaring function:

> A finding of fact in some cases is inseparable from the principle through which it was deduced. At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment. Where the line is drawn varies according to the nature of the substantive law at issue. Regarding certain largely factual questions in some areas of law, the stakes) in terms of impact on future cases and future conduct) are too great to entrust them finally to the judgment of the trier of fact.[150]

In support of its decision to review the issue of actual malice independently, the Court explained that the content of the "actual malice" rule is "given meaning through the evolutionary process of common-law adjudication."[151] The Court added that when the governing standard is provided by the Constitution, the

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147. 466 U.S. 485 (1984).

148. *Id.* at 514. The issue of actual malice as treated by the Court in *Bose* is considered by many commentators to fall within a special category of so-called "constitutional facts" that are reviewed *de novo*. The derivation of the phrase "constitutional fact" and the history of the development of the constitutional fact doctrine of *de novo* review are described in Monaghan, *supra* note 95, at 247–263 & n.17. *See also* Hoffman, *supra* note 135, at 1445–56 (summarizing the evolution and current status of the constitutional fact doctrine). The constitutional fact doctrine is an area of uncertain scope and origin. *See generally* 1 CHILDRESS & DAVIS, *supra* note 7, § 2.19; Louis, *supra* note 21, at 1031–32. Although it has clearly been applied to some *mixed* questions implicating constitutional rights, the doctrine may also apply to *historical* facts as well, at least in First Amendment cases. *See, e.g.*, Childress, *Constitutional Fact*, *supra* note 95, at 1229.

149. *See supra* notes 100–119 and accompanying text.

150. Bose Corp. v. Consumers Union, 466 U.S. 485, 501 n.17 (1984).

151. *Id.* at 502. Professor Monaghan criticized this aspect of the Court's opinion in *Bose*, pointing out that emphasis on the necessity for case-by-case adjudication would require *de novo* review of most claims under the Bill of Rights. Monaghan, *supra* note 95, at 243. Professor Monaghan finds the true "driving impulse" in *Bose* to be the Court's concern with protecting First Amendment values. *Id.*

Court's role in defining the limits of the standard through case-by-case adjudication is "of special importance."[152]

The Supreme Court undertook a more extended functional analysis in *Miller v. Fenton*,[153] a habeas corpus action challenging the voluntariness of a confession. Acknowledging the "elusive" nature of the fact/law distinction,[154] the Court attributed much of the difficulty in making the distinction to the "practical truth" that the decision to assign a label "is sometimes as much a matter of allocation as it is of analysis."[155] The Court then observed that where a question "falls somewhere between a pristine legal standard and a simple historical fact" and where Congress has not spoken, the distinction between fact and law "at times has turned on a determination that, as a matter of sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."[156]

In supporting its decision to review *de novo* the issue of the voluntariness of a confession, the Court referred in part to "nearly a half century of unwavering precedent" and to indications of congressional intent.[157] Turning to a more analytical approach, the Court noted that the voluntariness of a confession has "always had a uniquely legal dimension" and a "hybrid quality" that subsumes a complex of values.[158] The Court downplayed that approach, however, by emphasizing that, because assessments of credibility and demeanor were not critical to resolving the ultimate issue of voluntariness, the state-court judge was "not in an appreciably better position" than the reviewing court to determine whether the confession was obtained in a constitutionally permissible manner.[159] Finally, the Court indicated that its corrective function was strongly implicated because of an elevated risk "that erroneous resolution of the voluntariness question might inadvertently frustrate the protection of the federal right."[160] Although it professed confidence in state court judges, the

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152. *Bose*, 466 U.S. at 503.

153. 474 U.S. 104 (1985).

154. 474 U.S. at 113 (citing *Bose*, 466 U.S. 485, and Baumgartner v. United States, 322 U.S. 665).

155. 474 U.S. at 113–14 (citing Monaghan, *supra* note 95).

156. 474 U.S. at 114. As one example, the Court cited the *Bose* case, 466 U.S. at 503. The Court also noted that it had on "rare occasions" justified more piercing scrutiny as a method of compensating for bias or other shortcomings of the trier of fact. 474 U.S. at 114. *See infra* note 161. Conversely, the Court stated that it had resolved close questions in favor of deferential review when the issue turned largely on evaluations of witness demeanor and credibility. 474 U.S. at 114.

157. *Id.* at 115.

158. *Id.* at 116.

159. *Id.* at 116–17. The Court indicated, however, that findings of subsidiary facts such as the length of the defendant's interrogation should be reviewed deferentially. *Id.* at 117.

160. *Id.* at 117.

Court nevertheless noted its "important parallel role in protecting the rights at stake."[161]

Where constitutional issues are at stake, the importance of protecting the appellate courts' law-declaring and corrective functions often tends to weight the scale in favor of deferential review of mixed questions. Although the Supreme Court has relied on functional considerations in other decisions not involving constitutional considerations, its express or implied treatment of mixed questions has not been consistent.[162] This same pattern is reflected in the federal courts of appeal. In some circuits, all or most mixed questions are treated as questions of law and are reviewed by the appellate courts *de novo*.[163] Conversely, some federal circuits treat the majority of mixed questions as questions of fact, subject to deferential review.[164]

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161. *Id.* at 117–118. Professor Monaghan and others have also noted that the Supreme Court has more rigorously scrutinized the application of law to facts where it has perceived a need to curb "systemic bias" by other judicial actors. Monaghan, *supra*, note 95, at 272–73. *See also supra* note 156.

162. *See, e.g.*, 1 CHILDRESS & DAVIS, *supra*, note 7, § 2.18, at 2–99 & n.14 (many mixed questions are reviewed by the Court *de novo*, but other issues that seem to be mixed questions are reviewed deferentially without discussion). Nevertheless, the Court often emphasizes the *Miller v. Fenton* functional approach when it is discussing the standard of review for mixed questions generally. 1 CHILDRESS & DAVIS, *supra*, § 2.13, at 2–76.

163. *See, e.g.*, Krizek v. Cigna Group, Inc., 345 F.3d 91(2d Cir. 2003); Phansalkar v. Andersen Weinroth & Co., 344 F.3d 184, 199 (2d Cir. 2003); Weaver v. Shadoan, 340 F.3d 398, 405 (6th Cir. 2003) (mixed questions and "ultimate facts, based upon the application of legal principles to subsidiary facts" are reviewed *de novo*); Besta v. Beneficial Loan Co., 855 F.2d 532, 533 (8th Cir. 1988) (plenary review of mixed questions).

164. Some of the leading decisions explaining the rationale for reviewing mixed questions under deferential standards come from the Seventh Circuit. In *Cook v. City of Chicago*, 192 F.3d 693, 697 (1999), for example, Judge Posner observed that plenary review of mixed questions is appropriate only in two situations: when there is a perceived need for uniformity across cases or when the issue raised is of such importance that second guessing the initial decision maker is justified. *See id.* In explaining why functional factors pointed to deferential review of the trial judge's invocation of laches in the *Cook* case itself, Judge Posner noted that "[u]niformity is important at the level of doctrine, so that people are given clear guidance on conforming their behavior to law, but much less so at the level of the application of doctrine to particular facts, a level at which meaningful uniformity is unattainable because no two cases are alike." *Id.* Concluding that it was unlikely that a case with "identical facts" would recur, that the correct application of the laches doctrine was not "of such transcendent importance" as to merit more rigorous scrutiny, and that the trial judge was better positioned to make the decision, the court in *Cook* reviewed the trial judge's determination deferentially, resolving reasonable doubts in favor of the trial judge's ruling because of the latter's "greater immersion in the case." *Id. See also* Thomas v. Gen. Motors Acceptance Corp., 288 F.3d 305, 307 (7th Cir. 2002) ("divergent applications of law to fact do not unsettle the law)doctrine is unaffected)a heavy appellate hand in these cases is unnecessary to assure the law's clarity and coherence"); Bergersen v. Comm'r of Internal Revenue, 109 F.3d 56, 61 (1st Cir. 1997) (some deference should be afforded lower court's ultimate determination of mixed question because fact-finder is closer to evidence and may have a superior "feel"; value

Other appellate courts employ a more complicated analysis. For example, some courts expressly "bifurcate" mixed questions into two parts. Findings of basic or historical fact, as well as factual inferences, are reviewed deferentially, but the application of legal rules to the facts is reviewed *de novo*.[165] In contrast, the Ninth Circuit expressly employs a "functional analysis" to determine the standard of review for particular mixed questions. For each such question, the court refers to "the sound principles which underlie the settled rules of appellate review" and determines whether the concerns of judicial administration favor the trial judge or the appellate court.[166]

To make this assessment, the court determines if application of a legal rule to the facts requires an "essentially factual" inquiry.[167] If so, deferential review is appropriate. On the other hand, application of a legal rule to the facts may require the court to "consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles." If so, concerns of judicial administration favor the appellate court and the question is reviewed *de novo*.[168]

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of precedent is also limited "since the next shake of the kaleidoscope will produce a different fact pattern"); Mucha v. King, 792 F.2d 602, 605–06 (7th Cir. 1986) (Posner, J.) (appellate court's primary responsibility is to maintain law's uniformity and coherence)a responsibility which is not invoked when "the only question is the legal significance of a particular and nonrecurring set of historical events"). *See generally* Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. C. L. REV. 235 (1991) (advocating adoption of the Seventh Circuit approach).

165. *See, e.g.*, Scully v. US WATS, Inc., 238 F.3d 497, 505 (3d Cir. 2001) (narrative facts reviewed for clear error; whether District Court correctly applied state's presumption of at-will employment reviewed *de novo*); Theriot v. United States, 245 F.3d 388, 394 (5th Cir. 1998) (findings of mixed law and fact in admiralty action reviewed in two stages: underlying fact findings and factual inferences reviewed under clearly erroneous standard and legal conclusion based on factual data reviewed *de novo*).

166. United States v. McConney, 728 F.2d 1195, 1202 (1984). The Seventh Circuit analysis described *supra* note 164 is also essentially a functional analysis. From the leading cases, it appears, however, that the Ninth Circuit often finds that legal concepts predominate in mixed questions, while the Seventh Circuit often finds that "particular" and non-recurring factual patterns predominate. *Compare, e.g.*, Cook v. City of Chicago, 192 F.3d at 696 (mixed questions are generally reviewed deferentially), *with* Charter Communications Inc. v. County of Santa Cruz, 304 F.3d 927, 930 (9th Cir. 2002) (mixed questions are generally reviewed *de novo*). Whether facts are deemed likely to recur or present issues of general applicability may, however, depend on the level of generality with which they are described or framed. The circuit courts' differing conclusions may also reflect implicit *presumptions* about the standard under which mixed questions should be reviewed. *See infra* note 356 and accompanying text.

167. *McConney*, 728 F.2d at 1202.

168. *Id. See also* Charter Communications Inc. v. County of Santa Cruz, 304 F.3d at 930 (mixed questions are generally reviewed *de novo* unless they present "an 'essentially' factual inquiry"); Consolidated Mfg. v. Comm'r of Internal Revenue., 249 F.3d 1231, 1236 (10th Cir. 2001) (mixed questions are reviewed *de novo* or for clear error depending on whether

Utilizing this analysis, the Ninth Circuit has noted that "[t]he predominance of factors favoring *de novo* review is even more striking when the mixed question implicates constitutional rights."[169] On the other hand, the court identified two categories of cases in which deferential review is appropriate. The first category involves cases where someone's state of mind is the issue, as in *Swint*.[170] The second category consists of negligence cases.[171] Aside from this general guidance, the Ninth Circuit acknowledged that a functional analysis is not a "litmus test" that neatly categorizes all mixed questions. Instead, the court characterized its approach as a "neutral test that accurately reflects the concerns that properly underlie standard of review jurisprudence."[172]

In summary, federal courts generally recognize the existence of a separate category of mixed questions and increasingly emphasize functional considerations in determining the standard of review applicable to them. There is, however, no general consensus on what that standard of review should be, reflecting the complexity of the issues involved. In contrast, Illinois courts have generally been slower to recognize the existence of a separate category of mixed questions, although that state of affairs is changing. Following an overview of traditional Illinois standards of review for determinations of "law" and "fact" in the following section, Part IV of this article examines the Illinois Supreme Court's recent recognition of a new intermediate standard of review for at least some mixed questions, while Part V probes some of the ramifications of that development.

III. ILLINOIS STANDARDS OF REVIEW OF CONCLUSIONS OF LAW AND FINDINGS OF FACT IN CIVIL CASES UNDER TRADITIONAL ANALYSIS

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question is primarily factual or legal).

169. *McConney*, 728 F.2d at 1203.

170. *Id.* (citing Pullman-Standard v. Swint, 456 U.S. at 288).

171. *Id.* at 1204.

172. *Id.* For a more detailed analysis of the federal courts' treatment of mixed questions of fact and law, see generally 1 CHILDRESS & DAVIS, *supra* note 7, § 2.18. For a description of the treatment of particular mixed questions, see generally 1 CHILDRESS & DAVIS, *supra* note 7, §§ 2.21 to 2.30. For additional discussion of the comparative functional factors affecting the standard of review for mixed questions, see Louis, *supra* note 21, at 1010–15.

Illinois standards of appellate review[173] have traditionally been based on the fact/law dichotomy that has also been used in the federal appellate court system.[174] In general, questions of law have been reviewed in Illinois under a non-deferential or *de novo* standard of review. Findings of fact, as well as many mixed questions of fact and law, have been reviewed under a deferential standard. Unlike the federal courts, however, Illinois courts have traditionally applied a *single* deferential standard of review, regardless of the identity of the original decision-maker.[175] Thus, findings of fact by juries, circuit court judges and administrative agencies have all traditionally been reviewed under the "manifest weight of the evidence" standard described below.

A. *De Novo* Review of Conclusions of Law

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173. Illinois has a constitutionally based three-tiered court system consisting of the Illinois Supreme Court, an appellate court divided into five districts, and a single body of circuit courts of general jurisdiction serving judicial circuits consisting of one or more counties. ILL. CONST. art.VI, § 1 ("The judicial power is vested in a Supreme Court, an Appellate Court and Circuit Courts."); *id.* § 2 (State is divided into five Judicial Districts for the selection of both Supreme Court and Appellate Court judges); *id.* § 7(a)&(b) (describing structure of circuit courts); *id.* § 9 (Circuit Courts have original jurisdiction over all justiciable matters). *See also* PARNESS, *supra* note 6, at § 1–1 (describing history and structure of Illinois court system). The subject matter jurisdiction of the Illinois courts is generally defined constitutionally. *Id.* With some exceptions, the Illinois constitution does not specifically address the question of who makes practice and procedure laws in Illinois, including those governing civil appeals, although the primary responsibility appears to be shifting away from the legislature and toward the judiciary. *See id.* § 1–2 (discussing the complex structure and history of legislative and judicial responsibility for civil procedural law in Illinois). *See also* Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1078–79, 1091 (Ill. 1997) (describing separation of powers and inherent powers of judiciary). Under the Illinois Constitution, the legislature does share power with the judiciary to regulate judicial review of administrative agency decisions. *See generally* 6 NICHOLS ILL. CIV. PRAC. § 126.06 (2002) [hereinafter NICHOLS] (discussing balance of power between supreme court and legislature regarding procedures for judicial review of administrative actions). The sources of Illinois standards of review vary depending on whether the original decision maker is a jury, circuit court judge, or administrative agency.

174. *See supra* Parts I & II.A. Like the federal appellate courts, Illinois courts also recognize a third category of decisions: those committed to the discretion of the original tribunal. Such discretionary decisions are generally reviewed under the very deferential "abuse of discretion" standard. For a discussion of the Illinois standard of review for discretionary matters, see PARNESS, *supra* note 6, § 15–3(d); NICHOLS, *supra* note 173, § 126.25.

175. Thus, Illinois' deferential "manifest weight" standard for findings of fact has been characterized as a "one-size-fits-all" or "all-purpose" rule. O'Neill & Brody, *supra* note 6, at 515, 517. In contrast, findings of fact by federal district court judges are reviewed under a less deferential standard than findings by juries and administrative agencies. *See supra* Part I.C.

Like their federal counterparts, Illinois appellate courts have the ultimate responsibility for deciding questions of law.[176] Thus, they generally are not required to defer to legal interpretations and conclusions of law made by circuit courts, administrative agencies, and other original decision-makers.[177] Particular types of legal questions that are subject to *de novo* review in Illinois include the constitutionality of statutes,[178] the correct interpretation of statutes[179] and rules,[180] the appropriateness of decisions to grant motions for summary judgment[181] and motions to dismiss,[182] and the appropriateness of decisions to deny motions for a directed verdict or judgment notwithstanding the verdict.[183] Other examples of questions of law subject to non-deferential review include the existence of a legal duty[184] and the applicability of statutory evidentiary privileges.[185]

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176. "Any error of law affecting the judgment or order appealed from may be brought up for review." ILL. SUP. CT. R. 366(b)(1)(i).

177. Appellate courts' power of review over decisions by juries raises a somewhat different and more complicated analysis. In a jury trial, a judge instructs the jury as to the applicable law, but the jury applies the law to the facts of the case. To the extent the jury "makes law" as part of the application process, its decision is reviewed under the deferential manifest weight of the evidence standard of review. *See supra* note 145.

178. *See, e.g.*, *In re* Adoption of K.L.P., 763 N.E.2d 741, 744–45 (Ill. 2002) (decisions finding a statute unconstitutional are reviewed *de novo*); *In re* C.W., 766 N.E.2d 1105, 1113 (Ill. 2002) (same).

179. *See, e.g.*, Jarvis v. South Oak Dodge, Inc., 773 N.E.2d 641, 645 (Ill. 2002) (issues of statutory construction are reviewed *de novo*).

180. *See, e.g.*, *In re* Storment, 786 N.E.2d 963, 969 (Ill. 2002) (the construction of supreme court rules is a question of law reviewed *de novo*).

181. *See, e.g.*, Murneigh v. Gainer, 685 N.E.2d 1357, 1362 (Ill. 1997) (orders granting summary judgment on issues of law are reviewed *de novo*); Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1209 (Ill. 1992) (appeals from summary judgment rulings are reviewed *de novo*).

182. *See, e.g.*, Oliveira v. Amoco Oil Co., 776 N.E.2d 151, 159 (Ill. 2002) (orders granting motion to dismiss an amended class action complaint under 735 ILL. COMP. STAT. 5/2–615 (1996) are reviewed *de novo*); Kedzie & 103rd Currency Exch. v. Hodge, 156 N.E.2d 732, 735 (1993) (orders granting motion for involuntary dismissal under 735 ILL. COMP. STAT. 5/2–619 (2003) are reviewed *de novo*).

183. *See, e.g.*, Evans v. Shannon, 776 N.E.2d 1184, 1186 (Ill. 2002) (denials of motions for judgment not withstanding the verdict, like adverse rulings on motions for directed verdict, are reviewed *de novo*).

184. *See, e.g.*, Bucheleres v. Chicago Park Dist., 665 N.E.2d 826, 831 (Ill. 1996) (whether person owes duty of reasonable care under particular circumstances is issue of law for court and is reviewed *de novo*).

185. *See, e.g.*, Reda v. Advocate Health Care, 765 N.E.2d 1002, 1007 (Ill. 2002) (applicability of evidentiary privilege and exceptions thereto are matters of law subject to *de novo* review). For a more comprehensive discussion and listing of Illinois cases applying the *de novo* standard of review, see generally NICHOLS, *supra* note 173, § 118.14. *See also* PARNESS, supra note 6, § 15.3(a).

Despite the general rule that Illinois appellate courts review questions of law *de novo*, the Illinois Supreme Court has stated on a number of occasions that reviewing courts will give varying degrees of deference to conclusions of law by administrative agencies.[186] In some decisions, the court has explained that reviewing courts will give "substantial weight or deference"[187] to administrative agency interpretations of the statutes they administer, particularly if the statute is ambiguous[188] or the agency's interpretation is long-standing.[189] In other decisions, the court has indicated that agency interpretations of law will be given "some deference"[190] or simply "deference."[191]

In most instances where the Illinois Supreme Court has discussed the deference that courts will give to agency legal interpretations, the court has gone on to emphasize that the agency's interpretation of the law is not binding

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186. In other decisions, however, the supreme court has not referred in any way to judicial deference and has stated flatly that administrative agency interpretations of law are reviewed *de novo* or independently. *See, e.g.*, Raintree Health Care Ctr v. Ill. Human Rights Comm'n, 672 N.E.2d 1136, 1141 (Ill. 1996) (reviewing courts exercise independent review over agency conclusions of law and statutory construction); People ex rel. Hartigan, v. Ill. Commerce Comm'n, 592 N.E.2d 1066, 1074 (Ill. 1992) (stating without qualification that commission's interpretation of question of law is not binding on court).

187. *E.g.*, Reed v. Kusper, 607 N.E.2d 1198, 1203 (Ill. 1992) ("generally recognized" that courts give "substantial weight and deference" to agency interpretations of statutes they administer and enforce); Carson Pirie Scott & Co. v. State Dep't of Employment Sec., 544 N.E.2d 772, 777 (Ill. 1989) (same). *See also* Denton v. Civil Serv. Comm'n, 679 N.E.2d 1234, 1236 (Ill. 1997) (courts give "considerable deference" to agency interpretations of statutes they administer); Castillo v. Jackson, 594 N.E.2d 323, 330 (Ill. 1992) (courts give "substantial weight" to agency interpretations).

188. *E.g.*, Bonaguro v. County Officers Electoral Bd., 634 N.E.2d 712, 715 (Ill. 1994) (courts give "substantial weight and deference" to agency interpretations of ambiguous statutes if charged with the statute's interpretation and administration); Abrahamson v. Ill. Dep't of Prof'l Regulation, 606 N.E.2d 1111, 1121 (Ill.1992)(same); Ill. Consol. Tel. Co. v. Ill. Commerce Comm'n, 447 N.E.2d 295, 300 (Ill. 1983) (same).

189. *E.g.*, *Ill. Consol. Tel. Co.*, 447 N.E.2d at 300 (though consistency and duration are not requisites for according deference, agency statutory constructions that have been "consistently adhered to" for a long time will often be treated deferentially).

190. *E.g.*, Harrisburg-Raleigh Airport Auth. v. Dep't of Revenue, 533 N.E.2d 1072, 1073–74 (Ill. 1989) (agency's determination of question of law is entitled to "some deference").

191. *E.g.*, Shields v. Judges' Ret. Sys., 791 N.E.2d 516, 518 (Ill. 2003) (as "general rule" courts "accord deference" to agency interpretations of statutes they administer); Freeport v. Ill. State Lab. Rel. Bd., 554 N.E.2d 155, 163 (Ill. 1990) (courts "defer" to construction of ambiguous statute by administrative agencies); City of Burbank v. Ill. State Lab. Rel. Bd., 538 N.E.2d 1146, 1149 (Ill. 1989) (agency interpretation of statute is "generally accorded deference"); City of Decatur v. Am. Fed'n of State, County & Mun. Employees, 522 N.E.2d 1219, 1222 (Ill. 1988) (courts "accord deference" to agency statutory interpretations); Northern Trust Co. v. Bernardi, 504 N.E.2d 89, 93 (Ill. 1987) (courts "defer" to construction of ambiguous statutes by administrative agencies).

on the reviewing courts.[192] Thus, it appears that the Illinois appellate courts' policy of deference to administrative agency legal interpretations is an informal one and is not a rule of mandatory deference[193] similar to that accorded federal administrative agencies under the *Chevron* doctrine.[194]

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192. *E.g.*, Shields v. Judges' Ret. Sys., 791 N.E.2d at 518 (Ill. 2003) (though courts accord deference, an agency's statutory interpretation is not binding and will be rejected if erroneous); Gem Electronics of Monmouth, Inc. v. Dep't of Revenue, 702 N.E.2d 529, 532 (Ill. 1998) (though courts may give substantial deference, agency's conclusions of law are not binding on a reviewing court); Northern Trust Co. v. Bernardi, 504 N.E.2d at 93 ("fundamental" that erroneous constructions of statutes by agencies are not binding on courts). *See also* Castillo v. Jackson, 594 N.E.2d at 330 (deference to agency statutory interpretation does not displace judicial analysis); Freeport v. Ill. State Lab. Rel. Bd., 554 N.E.2d at 164 ("Reviewing courts may not rubber-stamp administrative decisions they deem inconsistent with the statutory mandate or that frustrate the policy underlying the statute."); Harrisburg-Raleigh Airport Auth. v. Dep't of Revenue, 533 N.E.2d at 1074 (agency decisions "based upon an erroneous, arbitrary or unreasonable construction of a statute cannot be allowed to stand").

193. *Cf*. Gem Electronics of Monmouth, Inc. v. Dep't of Revenue, 702 N.E.2d 529, 532 (Ill. 1998) (court "may give" substantial weight and deference to agency's interpretation of ambiguous statute it administers and enforces). At first glance, the supreme court's decision in *Greer v. Illinois Housing Development Authority*, seems to indicate that agency actions are subject to *de novo* review only in "rare instances." 524 N.E.2d 561, 576 (Ill. 1998). Read in context, however, the court appears to be summarizing the standards of review applicable to matters committed to agency discretion, which are traditionally reviewed under very deferential standards. *See supra* n.31.

194. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). *See supra* notes 40–44 and accompanying text. Several Illinois Supreme Court decisions have cited *Chevron* or its progeny with approval. In two instances, the court was discussing the deference to be given to *federal* agency interpretations of federal statutes. *See* Busch v. Graphic Color Corp., 662 N.E.2d 397, 407 (Ill. 1996) (discussing deference to be given to federal agency interpretation of Federal Hazardous Substance Act); Spitz v. Goldome Realty Credit Corp., 600 N.E.2d 1185, 1187 (Ill. 1992) (discussing deference to be given to Federal agency interpretation of Federal Home Owners Loan Act). Nevertheless, in *Church v. State*, 646 N.E.2d 572, 577 (Ill. 1995), the Illinois Supreme Court held that the Illinois legislature had expressly delegated to the Department of Professional Regulation the authority to determine which standards an applicant must meet in order to qualify for a private alarm contractor's license. Citing *Chevron*, 467 U.S. 837, the Illinois Supreme Court stated in *Church* that where the legislature expressly or implicitly delegates the authority to clarify and define a statutory provision to an agency, the court "should" give substantial weight to the agency interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Church*, 646 N.E.2d at 577. The court in *Church* did not expressly include its usual caveat that reviewing courts are "not bound" by the agency's interpretation. *See supra* note 192 and accompanying text. The court did, however, cite *Abrahamson v. Illinois Department of Professional Regulation* in conjunction with *Chevron*, and *Abrahamson* did contain such a caveat. 606 N.E.2d 1111, 1121 (Ill. 1992); 646 N.E.2d at 577. As indicated *supra* note 43, the *Chevron* doctrine is likely rooted in an interpretation of the legislative intent of the United States Congress; thus, there appears to be no compelling reason to impose its requirement of mandatory deference on Illinois reviewing courts absent a similar finding of intent in the legislative history of the Administrative Review Law or the organic statutes

In those instances where the Illinois Supreme Court has indicated that judicial deference should be accorded to agency interpretations of the laws they administer, the reasons given for that policy of deference are generally functional. In *Illinois Consolidated Telephone Co. v. Illinois Commerce Commission*,[195] for example, the court noted that "a significant reason" for giving such deference is that agencies are in a position to make informed judgments based on their experience and expertise.[196] Agencies are also able to provide informed guidance to the courts with regard to ascertaining legislative intent.[197]

B. Deferential Review of Findings of Fact: The Manifest Weight of the Evidence Standard

Although Illinois courts generally review conclusions of law under a non-deferential standard, they review findings of fact deferentially.[198] Thus, appellate courts do not re-weigh the evidence on appeal or make independent findings of fact.[199] Nor do they substitute their judgment for that of the original

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governing particular Illinois administrative agencies. Even in the presence of such intent, the shared legislative and judicial power over administrative agencies under the Illinois Constitution should be taken into account in any interpretation that unduly restricts the power of the Illinois Supreme Court to decide issues of law. *Cf.* Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1079 (Ill. 1997) ("the legislature is prohibited from enacting laws that unduly infringe upon the inherent powers of judges").

195. 447 N.E.2d 295 (Ill. 1983). The issue in the *Illinois Consolidated Telephone* case was whether the commerce commission had jurisdiction over radio paging as a "public utility." After initially concluding that it did have jurisdiction, the commission contended on appeal that it did not. The Supreme Court considered and gave weight to the agency's second attempt at construing the statute and ultimately agreed with the agency's interpretation. *Id.* at 299–301. *See also* Abrahamson v. Ill. Dep't of Prof'l Regulation, 606 N.E.2d at 1121 (citing *Illinois Consolidated Telephone* with approval).

196. 447 N.E.2d at 300.

197. *See id.*; Bonaguro v. County Officers Electoral Bd., 634 N.E.2d 712, 715 (Ill. 1994) (agencies are "an informed source" of legislative intent and can make "informed judgments" based on experience and expertise).

198. In delineating the scope of review of the Illinois appellate court, ILL. SUP. CT. R. 366(b)(1)(ii) states: "Any error of fact, in that the judgment or order appealed from is not sustained by the evidence or is against the weight of the evidence, may be brought up for review." Rule 366 does not draw a distinction between factual errors by juries and those by trial judges or other decision makers. *See* NICHOLS, *supra* note 173, § 118.22.

199. Abrahamson v. Ill. Dep't of Prof. Regulation, 606 N.E.2d at 1117. *See also* Rhodes v. Ill.Cent. Gulf R.R., 665 N.E.2d 1260, 1274 (Ill. 1996) (reviewing court may not reweigh the evidence and substitute its judgment for the jury's); Zadereka v. Ill. Human Rights Comm'n, 545 N.E.2d 684, 688 (Ill. 1989) (finding it "axiomatic" that reviewing court may not reweigh evidence or substitute its judgment for that of the trier of fact).

decision-maker or reverse a determination simply because an opposite conclusion is reasonable or the reviewing court might have ruled differently.[200] Rather, reviewing courts examine findings of fact or judgments solely to determine whether they are against the manifest weight of the evidence. As noted earlier, the manifest weight of the evidence standard is applied uniformly to findings of fact in Illinois regardless of whether the original decision-maker is a trial judge,[201] jury,[202] or administrative agency.[203]

Although there is no question that "manifest weight of the evidence" is a deferential standard of review, it is not as clear on its face what the term "manifest weight of the evidence" means or how the standard should be applied in practice. In recent years, the Illinois Supreme Court seems to have

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200. Abrahamson v. Ill. Dep't of Prof. Regulation, 606 N.E.2d at 1117. *See also* Bazydlo v. Volant, 647 N.E.2d 273, 276 (Ill. 1995) (reviewing court should not overturn trial court's findings "merely because it does not agree" or because it might have reached different conclusion); Kalata v. Anheuser-Busch Cos., 581 N.E.2d 656, 661 (Ill. 1991) (reviewing court must not substitute its judgment for that of the trier of fact).

201. *E.g.*, *Kalata*, 581 N.E.2d at 661 (Ill. 1991) (courts of review defer to trial court's factual findings unless they are against the manifest weight of the evidence). *See supra* note 175.

202. Jury determinations are accorded great deference in Illinois, as they are in the federal judicial system. The right to a trial by jury in civil cases in Illinois derives in part from the Illinois Constitution. *See* ILL. CONST. art I, § 13 ("right of trial by jury as heretofore enjoyed shall remain inviolate"); Martin v. Heinold Commodities, Inc. 643 N.E.2d 734, 753 (Ill. 1994) (constitutional right to a jury applies only to actions where the right existed under English common law at the time the first Illinois constitution was adopted). In other instances, a right to trial by civil jury is specifically authorized by the Illinois legislature. *See generally* PARNESS, *supra* note 6, §§ 57(1)–(26) (discussing the history and scope of the right to trial by jury in civil cases in Illinois). Although they give deference to jury verdicts, reviewing courts nevertheless have the authority to set aside a verdict if contrary to the manifest weight of the evidence. *See* Olson v. Chicago Transit Auth., 115 N.E.2d 301, 303 (Ill.1953) (tracing judicial power to review jury verdicts back to English common law precedents).

203. The power to adopt rules governing appeals of decisions by Illinois administrative agencies is shared by the legislature and the judiciary. *See supra* note 173. Many administrative agency appeals are governed by the Illinois Administrative Review Law. 735 ILL. COMP. STAT. §§ 5/3–101 to 3–113 (2002). The Act's provisions generally apply to administrative action of a judicial or quasi–judicial nature. NICHOLS, *supra* note 173, § 126.03. *See also id.* § 126.03 (discussing act's scope). Section 5/3–110 of the Administrative Review Law provides that administrative agency findings of fact are deemed to be *prima facie* true and correct. 735 ILL. COMP. STAT. § 5/3–310 (2002). *See* infra note 282. The supreme court has interpreted this provision to mean that the reviewing court is limited to ascertaining whether the findings and ultimate decisions of an administrative agency are against the manifest weight of the evidence. *E.g.*, Davern v. Civil Serv. Comm'n, 269 N.E.2d 713, 714 (Ill. 1970). Where an organic statute does not expressly adopt the Administrative Review Law provisions for judicial review or otherwise provide for a form of review, agency determinations may be appealed via a common law writ of *certiorari*. The standards of review under the writ are "essentially the same" as those under the Administrative Review Law. Hanrahan v. Williams, 673 N.E.2d 251, 253–54 (Ill. 1996).

settled on a relatively uniform[204] definition of "manifest weight of the evidence" when speaking of jury verdicts.[205] Thus, a jury verdict is deemed to be against the weight of the evidence "where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary, and not based upon any of the evidence."[206] The same or virtually the same definition has also been applied in a number of recent supreme court cases

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204. Appellate court characterizations of the manifest weight of the evidence rule applicable to jury verdicts and trial court determinations are less uniform. *Compare, e.g.*, Monier v. Winkler, 511 N.E.2d 246, 250 (Ill. App. Ct. 1987) (manifest weight of the evidence is "that weight which is clearly evident, plain and indisputable"), *with* Raclaw v. Fay, Conmy & Co., 668 N.E.2d 114, 116 (Ill. App. Ct. 1996) (for trial court judgment to be against manifest weight of evidence, appellant "must present evidence that is so strong and convincing as to overcome, completely, the evidence and presumptions, if any, existing in the appellee's favor"). *See generally* NICHOLS, *supra* note 173, § § 118.15, 118.21 to 118.27; 118.33 to 118.37 (citing a number of Illinois cases describing the manifest weight of the evidence rule). In defining or explaining the manifest weight standard of review in jury cases, a number of appellate court decisions state that verdicts are against the manifest weight of the evidence if they are "palpably erroneous." *E.g.*, Young v. City of Centreville, 523 N.E.2d 621,628 (Ill. App. Ct. 1988). The derivations of this particular explanation of the manifest weight rule are not clear, as the Illinois Supreme Court has used the term "palpably erroneous" or variations thereof relatively infrequently. *But see, e.g.*, Forest Pres. Dist. v. Galt, 107 N.E.2d 682, 684 (Ill. 1952) (whether jury verdict is against manifest weight of the evidence requires either a "clear and palpable mistake" or a showing that the verdict was the result of passion and prejudice). The terms "palpable," "clear" and "manifest" are, however, basically synonymous. *See* WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 1290 (one definition of "palpable" is "clear to the mind; obvious; evident, plain"). Thus, the appellate court gloss on the meaning of the manifest weight of the evidence rule does not appear to reflect an attempt to change its scope. Nevertheless, indiscriminate use of terms such as "palpably erroneous" and "clearly erroneous" in defining manifest weight of the evidence risks confusion with the more deferential "clearly erroneous" rule. *See supra* Part I.C.2, *infra* Part IV.

205. Technically, civil jury verdicts and circuit court judgments following trial without a jury are a form of "mixed question" in that they typically involve the application of legal rules to the facts presented at trial to reach an over-all determination of liability or no liability. As discussed in the following section, the manifest weight of the evidence standard has traditionally been applied to many mixed questions in Illinois. *See infra* note 232 and accompanying text. The same or similar definitions of manifest weight of the evidence seem to be employed regardless of whether the judgment as a whole or a particular finding of fact is under review.

206. Snelson v. Kamm, 787 N.E.2d 796, 815 (Ill. 2003). Other supreme court decisions use the same or substantially the same definition. *E.g.*, Leonardi v. Loyola Univ., 658 N.E.2d 450, 461 (Ill. 1995) (judgment on jury verdict is against manifest weight of evidence only when opposite conclusion is "apparent" or when findings "appear to be unreasonable, arbitrary, or not based on evidence"); Maple v. Gustafson, 603 N.E.2d 508, 512–13 (Ill. 1992) (quoting lower court opinions holding that a jury verdict is against the manifest weight of the evidence if opposite conclusion is clearly evident or jury findings are unreasonable, arbitrary and not based on any of the evidence).

reviewing judgments, as well as particular findings of fact, rendered by circuit courts in bench trials. [207]

There appears to be less uniformity in the definitions and explanations of "manifest weight of the evidence" used by the Illinois Supreme Court when determinations of Illinois administrative agencies are under review on appeal.[208] One frequently cited administrative agency decision states that agency findings are against the manifest weight of the evidence only if the opposite conclusion is "clearly evident."[209] Other opinions state that the

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207. *E.g.*, Bazydlo v. Volant, 647 N.E.2d 273, 277 (Ill. 1995) (judgment in bench trial is against manifest weight of the evidence only when "opposite conclusion is apparent" or findings "appear to be unreasonable, arbitrary, or not based on evidence"). At times, however, the supreme court explains the manifest weight standard for bench trials in other terms. *E.g.*, Suburban Bank v. Bousis, 578 N.E.2d 935, 942 (Ill. 1991) ("In general, great weight is attached to the trial judge's factual findings.")

208. There is a similar lack of uniformity in definitions and explanations of the manifest weight of the evidence standard in administrative law cases at the intermediate appellate court level. *Compare, e.g.*, File v. D & L Landfill, Inc., 579 N.E.2d 1228, 1232 (Ill. App. Ct. 1991) (administrative decision is against the manifest weight of the evidence only if opposite result is "clearly evident, plain, or indisputable from a review of the evidence"), *with* EPA v. Pollution Control Bd., 624 N.E.2d 402, 404 (Ill. App. Ct. 1993) (if "any evidence fairly supports" its action, agency decision is not against the manifest weight of the evidence). *See also* Berry v. Edgar, 548 N.E.2d 575, 578 (Ill. App. Ct. 1989) (reviewing court's sole function is to determine if agency's decision is "just and reasonable in light of the evidence presented"). Tracing back the various judicial glosses on the meaning of "manifest weight of the evidence" gives glimpses at times of a process similar to the proverbial office rumor mill. Thus, by the time a definition has been repeated, explained and rephrased over a number of years, the result sometimes bears little resemblance to the original source. *Cf.* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 264–65 (1986) (Brennan, J., dissenting) (in another context, comparing the Court's reasoning to the children's game of "telephone," where a message is repeated from person to person to person, so that eventually, "the message bears little resemblance to what was originally spoken."). Another factor that helps to engender confusion is reliance on federal precedents of dubious relevance. In one instance, for example, a court held that to find an administrative agency decision against the manifest weight of the evidence, the reviewing court must determine that "no rational trier of fact could have agreed" with the agency decision. Agans v. Edgar, 492 N.E.2d 929, 933 (Ill. App. Ct. 1986). In support of this interpretation, the court relied on a United States Supreme Court case reviewing the record in a habeas corpus proceeding to determine whether the evidence supported a finding of guilt beyond a reasonable doubt. *Id.* at 933–34 (citing Jackson v. Virginia, 443 U.S. 307 (1979)).

209. Abrahamson v. Ill. Dep't of Prof'l Regulation, 606 N.E.2d 1111, 1117 (Ill. 1992). This formulation reflects part of the definition in *Snelson*, 787 N.E.2d at 815, but omits the reference to findings that are unreasonable, arbitrary or not based on evidence. *See supra* note 206 and accompanying text. *See also* Ceres Ill., Inc. v. Ill. Scrap Processing, Inc., 500 N.E.2d 1, 4 (Ill. 1986) (trial court finding is contrary to the manifest weight of the evidence if, after viewing the evidence in light most favorable to prevailing party, conclusions opposite to those reached below are "clearly evident"). Other administrative law cases state that a decision is against the manifest weight of the evidence if the opposite conclusion is "clearly apparent," a phrase that seems synonymous with "clearly evident." *See, e.g.*, Jack Bradley,

manifest weight of the evidence standard applies only if the reviewing court determines that "no rational trier of fact" could have reached the conclusion reached by the agency.[210] In yet other instances, the court explains the meaning of the manifest weight standard by reference to the degree of deference being accorded to the administrative agency or the sufficiency of the evidence in support of the agency's decision.[211] It is not clear whether these different explanations and approaches reflect differing degrees of deference to be accorded to particular findings of fact by administrative agencies or whether they are simply different formulations of the same basic standard.

Even if the various alternative explanations of the "manifest weight of the evidence" standard are discarded in favor of universal adoption of the definition of manifest weight of the evidence often used in cases reviewing findings by juries and trial courts,[212] that definition itself raises questions of interpretation. For example, it is not clear from some decisions how one tells whether the opposite conclusion is "clearly evident" without weighing the

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Inc. v. Dep't of Employment Sec., 585 N.E.2d 123, 128 (Ill. 1991).

210. Chief Judge v. Am. Fed'n of State, County & Mun. Employees, 607 N.E.2d 182, 185 (Ill. 1992). This definition seems most prevalent in cases in which the agency's decision relates to a matter that is committed to agency discretion, but that also requires accompanying determinations of fact. To the extent that it requires extreme deference to agency findings, the "no rational trier of fact" definition of manifest weight of the evidence arguably should be confined to cases governed by the abuse of discretion standard of review, which is generally considered the most deferential of the various standards. *See supra* note 174.

211. *E.g.*, Benson v. Indus. Comm'n, 440 N.E.2d 90, 93 (Ill. 1982) (test for determining if agency decision is against the manifest weight of the evidence is whether there is "sufficient factual evidence in the record" in support). *See also Ceres*, 500 N.E.2d at 4 (citing cases that indicate the manifest weight standard requires more than a showing that there is "sufficient evidence" to support a contrary judgment); EPA v. Pollution Control Bd., 427 N.E.2d 162, 169 (Ill. 1981) (where there was adequate supporting evidence and "no substantial contrary evidence," agency's finding was not contrary to the manifest weight of the evidence). Other supreme court cases, particularly the older ones, offer a variety of other definitions and explanations of the manifest weight standard of review in administrative law cases. *See, e.g.*, Davern v. Civil Serv. Comm'n, 269 N.E.2d 713, 714 (Ill. 1970) (reviewing court is limited to a determination whether agency's final decision "is just and reasonable in light of the evidence presented"); Fenyes v. State Employee's Ret. Sys., 160 N.E.2d 810, 813 (Ill. 1959) (court's function in reviewing administrative agency findings is comparable to that presented where court is called upon to determine whether there is "competent evidence" to support judgment of lower court); Liberty Foundries Co. v. Indus. Comm'n, 25 N.E.2d 790, 794 (Ill. 1940) (court may not substitute its judgment for that of an agency unless agency's findings are "clearly and manifestly against the weight of the evidence").

212. *See supra* note 206 and accompanying text.

evidence. [213] Assuming that the reviewing court does not weigh the evidence *sub silentio*, but merely checks to see if a sufficient quantum of evidence supports a finding or judgment, it is not clear *how much* evidence and of what quality is needed.[214] If any evidence is sufficient, as some cases indicate, [215] it is arguable that the reviewing courts have completely abdicated their corrective function[216] except in those instances where the fact-finder acted arbitrarily, unreasonably, or out of bias or prejudice.[217] Conversely, if the focus of the manifest weight of the evidence standard shifts to an inquiry of whether an opposite conclusion to that reached by the fact-finder is clearly evident, that change in focus seems to lead to the conclusion that the decision actually reached by the fact finder is clearly wrong or clearly erroneous. If so, it is not clear on its face how the manifest weight of the evidence test differs

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213. As indicated earlier, the supreme court has emphasized that reviewing courts do not "reweigh evidence." *See supra* note 199 and accompanying text. The court has hence rejected a line of decisions in the appellate court that reviewed agency determinations to determine if they were supported by a preponderance of the evidence. Eastman Kodak Co. v. Fair Employment Practices Comm'n, 426 N.E.2d 877, 884 (Ill. 1981). Nevertheless, the supreme court itself has sometimes conveyed the impression, perhaps inadvertently, that it is in fact weighing evidence by seeming to hold that an appellant has or has not met his burden of proof. *E.g.*, *Jack Bradley*, 585 N.E.2d at 128, 132 (after stating that the manifest weight standard applies, court later states its belief that appellant "failed to carry its strict burden of proof" and therefore agency had "substantial basis" for its decision); Griffitts Constr. Co. v. Dep't of Labor, 390 N.E.2d 333, 336 (Ill. 1979) (after finding "that plaintiff has not met its burden of proof," court holds that agency's decision is not against the weight of the evidence and "is supported by the evidence"). *See also* Bazydlo v. Volant, 647 N.E.2d 273, 277 (Ill. 1995) (under auspices of manifest weight standard, supreme court rejects trial court's determination in bench trial that appellants did *not* meet "clear and convincing" evidence burden of proof, on grounds that fact finder may not "arbitrarily or capriciously reject unimpeached testimony").

214. The supreme court sometimes states that findings are not against the manifest weight of the evidence when or if there is "evidence to support" them. *Abrahamson*, 606 N.E.2d at 1117; *Fenyes*, 160 N.E.2d at 813. This could imply that *any* evidence, even a mere scintilla, is sufficient.

215. *E.g.*, Brown v. Zimmerman, 163 N.E.2d 518, 523 (Ill. 1960) (findings and judgment of trial court will not be disturbed on review "if there is any evidence in the record to support such findings").

216. *See supra* notes 140–144 and accompanying text.

217. In closely contested cases where substantial evidence is presented on both sides, the manifest weight of the evidence standard of review clearly protects the fact-finder's ultimate determination from reversal on appeal in the ordinary case governed by the preponderance of the evidence burden of proof. *See, e.g.*, Kalata v. Anheuser-Busch Co., 581 N.E.2d 656, 661 (Ill. 1991) (where evidence is close and findings must be determined from credibility of witnesses, reviewing court will defer to trial judge's findings of fact). The cases are more contradictory, however, in explaining where on a continuum between no evidence and a preponderance of the evidence there is a sufficient quantum of evidence to require deference to the fact-finder's determination.

from the less deferential clearly erroneous test used to review findings of fact by district court judges in the federal system.[218]

In administrative law cases, an analysis of the degree of deference accorded by the manifest weight standard is further complicated by the Illinois Supreme Court's wavering stance on the relationship between that standard and the federal substantial evidence rule.[219] Prior to 1974, some Illinois Supreme Court decisions indicated that manifest weight of the evidence and substantial evidence were related or perhaps alternative tests.[220] In *Basketfield v. Police Board*,[221] however, the court rejected the appellant's contention that the federal substantial evidence standard of review should be followed.[222] In doing so, the court did not explain in any depth why it declined to follow the substantial evidence rule or how the federal rule differs from the manifest weight of the evidence standard. Thus, it is not clear whether the court in *Basketfield* was simply trying to minimize the use of alternative labels for similar standards of review, whether it misunderstood the meaning of

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218. All word tests have inherent limitations. *See, e.g.*, 1 CHILDRESS & DAVIS, *supra* note 7, § 1.01, at 1–2 (word formulations do not say much until reviewing courts give them life through discussion and application). Reviewing courts and practitioners who handle a number of appeals no doubt develop a "feel" for how the standards of review are interpreted and applied in practice. For the less experienced, however, the meaning and scope of "manifest weight of the evidence" are not self-evident. A profusion of tests on tests is not necessarily helpful, as alternative or additional explanations tend often to cause more confusion than clarity. *See, e.g.*, First Options of Chicago, Inc. v. Kaplan, 514 U.S. at 948 ("it is undesirable to make the law more complicated by proliferating special review standards without good reason"); 1 CHILDRESS & DAVIS, *supra* note 7, § 2.04, at 2–26 ("Tests-on-tests may, in the long run, cloud the real scope [of Federal Rule of Civil Procedure 52(a)] more easily than the clearly erroneous phrase practically unadorned"). Nevertheless, it may provide some assistance to practitioners and others if the supreme court would continue to make it a practice to include in its judicial decisions a general explanation of the degree of deference being given in particular instances, such as "substantial deference" or "some deference." This guidance is particularly helpful where two different standards of review such as "manifest weight" and "substantial evidence" are being compared. Although themselves inherently imprecise, phrases describing degrees of deference may help to act as signals in a way that a term such as "manifest weight of the evidence" on its own cannot.

219. *See supra* notes 65–71 and accompanying text.

220. *See, e.g.*, Heft v. Zoning Bd. of Appeals, 201 N.E.2d 364, 366 (Ill. 1964) (issue on administrative review is whether there was substantial evidence to support the agency's decision); Mohler v. Dep't of Labor, 97 N.E.2d 762, 765 (Ill. 1951) (court will not disturb agency findings of fact unless they are manifestly against the weight of the evidence "or unless there is no substantial evidence to support them"); Drezner v. Civil Serv. Comm'n, 75 N.E.2d 303, 307–308 (Ill. 1947) (reviewing courts have power to determine if agency findings are against the manifest weight of the evidence or if there is substantial evidence in the record in support).

221. 307 N.E.2d 371, 375 (Ill. 1974).

222. The court restated this position in *Kerr v. Police Bd.*, 319 N.E.2d 478, 478–79 (Ill. 1974), but did not elaborate on its reasons for rejecting the substantial evidence rule.

substantial evidence,[223] or whether the manifest weight standard does in fact require a different degree of deference to agency findings of fact than does the federal substantial evidence rule.[224] To add to the confusion, the supreme court has stated in several decisions since 1974 that substantial evidence supports an agency decision.[225]

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223. The court may have viewed the substantial evidence test as equivalent to a reweighing of the evidence, which it is not. *See supra* Part I.C.1. Although it is generally undesirable to use double negatives to define concepts, the tenor of the "substantial evidence" rule seems to be better conveyed by the notion that the evidence supporting an agency finding of fact must "not be insubstantial." *Cf.* 1 CHILDRESS & DAVIS, *supra* note 7, § 3.04, at 3–34 (though "substantial" implies "a lot" in common parlance, judges instead mean "more than some" and may refer more to quality than amount).

224. Whether the supreme court views the manifest weight standard of review as more or less deferential than the federal substantial evidence standard is not clear from the *Basketfield* opinion. On the one hand, the supreme court stated that "the permissible scope of judicial inquiry concerning factual determinations by administrative agencies *has been limited to* ascertaining if the agency decision was contrary to the manifest weight of the evidence." *Basketfield*, 307 N.E.2d at 375 (emphasis added). This passage may indicate that the court views the manifest weight standard as *more* deferential than the federal standard. On the other hand, the appellant in *Basketfield* had suggested "adaptation of the Pedrick norm" to define the federal substantial evidence rule. *Id.* at 375 (citing Pedrick v. Peoria & Eastern R.R. Co., 229 N.E.2d 504 (Ill. 1967)). In *Pedrick*, the supreme court held that a directed verdict or judgment n.o.v. is proper only when "all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." *Pedrick*, 229 N.E.2d at 513–514. By seeming to reject the *Pedrick* requirement that evidence be "overwhelming," the court may have been implicitly holding that the manifest weight standard of review is *less* deferential than the proffered definition of substantial evidence. *Cf.* Maple v. Gustafson, 603 N.E.2d 508, 512 (Ill. 1992) ("a judgment *n.o.v.* may not be granted merely because a verdict is against the manifest weight of the evidence"). The remainder of the court's discussion in *Basketfield* does not help to clarify the ambiguity in the court's reasoning. Although it went on to state that it would not hesitate to grant relief if the record did not "disclose evidentiary support" for the agency's decision, 307 N.E.2d at 375, the *Basketfield* court did not indicate what level of evidentiary support would suffice to preclude reversal of the agency's decision.

225. *E.g.*, People *ex. rel.* Hartigan v. Ill. Commerce Comm'n, 592 N.E.2d 1066, 1075 (Ill. 1992) (agency findings of fact will be affirmed if supported by substantial evidence in the record); Carver v. Bond/Fayette/Effington Reg'l Bd. of Sch. Trustees, 586 N.E.2d 1273, 1280 (Ill. 1992) (after finding school board's decision supported by substantial evidence, court is unable to say decision was contrary to the manifest weight of the evidence); City of Burbank v. Ill. State Labor Relations Bd., 538 N.E.2d 1146, 1150 (Ill. 1989) (because motive involves a factual determination, agency's finding must be accepted on appeal if supported by substantial evidence); Bd. of Educ. v. Reg'l Bd. of Sch. Tr., 433 N.E.2d 240, 242 (Ill. 1982) (when agency's determination is supported by substantial evidence it must be affirmed). A number of appellate court decisions also continue to refer to the substantial evidence rule. *E.g.*, Commonwealth Edison Co. v. Ill. Commerce Comm'n, 692 N.E.2d 1350, 1356 (Ill. App. Ct. 1998) (stating that reviewing court should affirm commission's findings of fact if supported by substantial evidence in the record and defining substantial evidence as more than a mere scintilla, but not necessarily a preponderance of the evidence); Singh v. Dep't of Prof'l Regulation, 625 N.E.2d 656, 661 (Ill. App. Ct. 1993) (agency findings will not be reversed

Regardless of the precise definition and scope of the manifest weight standard, the proffered reasons for granting deference to the judgments and findings of fact of juries, trial courts, and administrative agencies are often functional and are generally similar to many of the reasons advanced by the federal courts.[226] The Illinois Supreme Court has stated on a number of occasions, for example, that the original fact finder is in the best position to assess witnesses' conduct, make credibility determinations, and weigh conflicting evidence.[227] The court has also given some indication that a greater degree of deference is appropriate in "close cases" where findings of fact are dependent on assessments of the credibility of witnesses.[228]

IV. MIXED QUESTIONS IN ILLINOIS: FROM *BRANSON* TO *CARPETLAND*

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unless against the manifest weight of the evidence or not supported by substantial evidence or foundation in the record); Galarza v. Dep't of Labor, 520 N.E.2d 672, 675 (Ill. App. Ct. 1987) (where agency's findings are not supported by substantial evidence they will be reversed). *But see* Starkey v. Civil Serv. Comm'n, 435 N.E.2d 176, 179–80 (Ill. App. Ct. 1982) (after questioning the reasoning of *Basketfield*, court concludes it has not been overrruled).

226. Deference may also be mandated by the constitution, as in the case of jury verdicts, or by statute. *See supra* notes 202–203.

227. *E.g.*, *In re* Storment, 786 N.E.2d 963, 969 (Ill. 2002) (deference is accorded findings of fact by administrative agency because agency is able to observe witnesses' demeanor, assess credibility, and evaluate conflicting testimony); *In re* Spak, 719 N.E.2d 747, 754 (Ill. 1999) (agency's findings regarding witness credibility, resolution of conflicting testimony and other fact-finding judgments are entitled to "great deference" because agency is able to observe demeanor and judge credibility); Bazydlo v. Volant, 647 N.E.2d 273, 276–77 (Ill. 1995) (trial judge is in a position superior to a reviewing court to observe witnesses, judge credibility and determine weight that testimony should receive); Maple v. Gustafson, 603 N.E.2d 508, 511–12 (Ill. 1992) (it is"unquestionably" the jury's province to resolve evidentiary conflicts, assess witness credibility and decide weight of testimony); Schulenburg v. Signatrol, Inc., 226 N.E.2d 624, 626 (Ill. 1967) (trial judge as fact finder is in "a position superior to a court of review" to observe witnesses, determine credibility and weigh evidence). *See also* Launius v. Bd. of Fire & Police Comm'rs, 603 N.E.2d 477, 481 (Ill. 1992) (it is not the reviewing court's function or duty to resolve factual inconsistencies or weigh evidence to determine where the preponderance lies); Kalata v. Anheuser-Busch Co., 581 N.E.2d 656, 660 (Ill. 1989) (it is function of trial judge in a bench trial to weigh evidence and make findings of fact). *See also* Flynn v. Cohn, 607 N.E.2d 1236, 1240 (Ill. 1992) (trial judge was in best position to resolve conflicts in expert testimony and determine credibility).

228. Chicago Inv. Corp. v. Dolins, 481 N.E.2d 712, 714 (Ill. 1985) (where findings of fact "must necessarily be determined" from witnesses' credibility in close cases, "it is particularly true" that the reviewing court will defer to the findings of the circuit court). *See also Kalata*, 581 N.E.2d at 660 (in close cases where findings of fact must be determined from credibility of witnesses, reviewing court will defer to trial court's findings unless against the manifest weight of the evidence); Zadereka v. Ill. Human Rights Comm'n, 545 N.E.2d 684, 688 (Ill. 1989) (that findings of fact are entitled to deference "is particularly true of credibility determinations").

Prior to the 1990s, the Illinois Supreme Court generally did not identify mixed questions of fact and law as a separate category of questions subject to special analysis on review.[229] Rather, the court treated mixed questions within the traditional fact/law dichotomy, often implicitly[230] and occasionally explicitly.[231] Where the court recognized that a "mixed question" existed, it generally treated the issue as one of "fact" subject to review under the manifest weight of the evidence standard of review.[232] As in other jurisdictions, however, the court strove at times to move certain mixed questions into the "law" category, making them subject to *de novo* review. In many instances, this took place under the guise of the "documentary evidence" or "undisputed facts" doctrine.[233] Beginning in 1995, however, the supreme court took a fresh look at mixed questions of fact and law in the administrative law context and eventually announced a new "intermediate" standard of review. The process by which that new intermediate standard developed and the uncertainties regarding the new rule's meaning and scope are the subject of both this section and Part V of this article.

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229. The term "mixed question of fact and law" does, however, appear in Illinois Supreme Court decisions as early as 1844. Cook v. Scott, 6 Ill. 333 (1844). The concept of a mixed question was discussed in early supreme court cases to delineate the respective provinces of the trial judge and jury. *Id.* (question whether appraiser was disinterested was mixed question of fact and law within the province of the jury to decide); Wooley v. Fry, 30 Ill. 158, 162 (1863) (whether mortgagee was diligent in taking possession of mortgaged property is a mixed question of law and fact as to which court determines what time is reasonable and jury says whether mortgage was foreclosed within that time).

230. *E.g.*, Kahn v. James Burton Co., 126 N.E.2d 836, 841 (Ill. 1955) (questions of due care, negligence and proximate cause are "pre-eminently questions of fact" for determination by jury).

231. *E.g.*, Staufenbiel v. Staufenbiel, 58 N.E.2d 569, 574 (Ill. 1944) (what constitutes delivery of a deed is a mixed question of law and fact reviewed under manifest weight of the evidence standard of review).

232. *E.g.*, *id.* *See also* Greene v. Indus. Comm'n, 428 N.E.2d 476, 477 (Ill. 1981) (permissible conflicting inferences regarding risks taken by a decedent present a mixed question reviewed under the manifest weight standard).

233. *E.g.*, St. Paul Fire & Marine Ins. Co. v. Frankart, 370 N.E.2d 1058, 1061 (Ill. 1977) ("where facts are not in dispute, their legal effect becomes a matter of law"); Puttkammer v. Indus. Comm'n, 21 N.E.2d 575, 577 (Ill. 1939) (whether deceased received injuries arising out of employment, where the facts were stipulated, was a question of law). *See also* United Farm Bureau Mut. Ins. Co. v. Elder, 427 N.E.2d 127, 129 (Ill. 1981) (characterizations of issues as mixed questions "should be sparingly applied"; where the facts are clear, the appellate court's responsibility is to rule on the legal effect of those facts and there is "no need" for the fact finder's services).

A. *Branson* and *City of Belvidere* Introduce a New Intermediate Standard of Review

Shortly after the O'Neill and Brody article was published, the Illinois Supreme Court took its first tentative steps toward adoption of a new standard of review for mixed questions of fact and law in civil cases. In an opinion written by Justice McMorrow, the court utilized the case of *Branson v. Department of Revenue*[234] to indicate its willingness to depart from the traditional rules for reviewing mixed questions in Illinois.[235] However, the court did not affirmatively adopt a new standard of review in *Branson*. Instead, it merely stated in dicta that a new standard for mixed questions would be appropriate.

In *Branson*, the sole shareholder, director, and officer of a corporation operating a family restaurant appealed a decision by the Illinois Department of Revenue to assess the officer personally for a tax penalty. The penalty was based upon the officer's willful failure to pay retailers' occupation taxes owed by the corporation.[236] Following a hearing, an administrative law judge concluded that the revenue department had presented sufficient evidence to prove that the corporate officer had "voluntarily or intentionally" violated his duty to remit the corporation's taxes.[237] On administrative review of the department's decision to finalize the tax penalty, the circuit court set aside the agency's decision on the ground that it was against the manifest weight of the evidence.[238] On appeal, the appellate court affirmed in part and reversed in part,[239] and the Illinois Supreme Court granted the corporate officer's ensuing petition for leave to appeal.

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234. 659 N.E.2d 961 (Ill. 1995).

235. As was characteristic of its focus in later years, the supreme court chose to raise the possibility of an intermediate standard of review in a case involving appellate review of an administrative agency decision. It is not yet clear whether that new intermediate standard will be applied to circuit court determinations. *See infra* notes 280–90; 325 & 352 and accompanying text.

236. 659 N.E.2d at 963–64. The penalty was imposed pursuant to section 13 1/2 of the Illinois Retailers' Occupation Tax Act, 120 Ill. Rev. Stat. ¶ 452 1/2 (1991) (later repealed and replaced by 35 ILL. COMP. STAT. ANN. 735/3–7 (West 2003)), which provided for a penalty against officers of corporations who "willfully" failed to make retailers' occupation tax payments. *Id.*

237. *See Branson*, 659 N.E.2d at 963–64; 970.

238. 659 N.E.2d at 964.

239. Branson v. Dep't of Revenue, 644 N.E.2d 1193 (Ill. App. Ct. 1994).

After reviewing *de novo* a pivotal question of statutory interpretation,[240] the supreme court turned to the question of whether there was sufficient evidence to support a finding by the administrative law judge that the corporate officer's failure to pay the occupation taxes was "willful." In identifying the applicable standard of review, the court first described the fact/law analysis traditionally used in Illinois to determine whether the standard of review of an administrative agency decision is deferential or non-deferential.[241] The court then noted that "the scope of judicial review does not always fit neatly into the fact/law dichotomy when the issue under review presents a mixed question of fact and law."[242] Citing generally to the 1995 O'Neill and Brody article,[243] the supreme court pointed out the importance of accurate characterization of the standard of review for an issue on appeal because it "bears directly upon the degree of deference given to the trier of fact, which in turn governs the scope of appellate review."[244]

Turning specifically to the willfulness issue, the supreme court observed that willfulness appeared to be primarily a question of "fact" because it required a review of evidentiary facts in the record relating to the taxpayer's conduct. In support of this characterization of the *factual* component of the issue, the court pointed to the administrative law judge's listing of "specific facts"[245] from the record in support of her ruling.[246] On the other hand, the supreme court also recognized that "to the extent the willfulness element of the tax penalty is a term of art, or constitutes a legal conclusion, the exact characterization of willfulness might be viewed more precisely as a mixed question of fact and law."[247] In support of its characterization of the *legal* component of the question, the court pointed to the administrative law judge's

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240. The issue concerned the burden of proof as to the willfulness element. *See Branson*, 659 N.E.2d at 965–68.

241. 659 N.E.2d at 969–70. Acknowledging that agency findings of fact are reviewed under the manifest weight of the evidence standard, the court explained that this meant that agency factual determinations are given "substantial deference." *Id.* In contrast, issues of law are reviewed *de novo* and agency rulings are given "little or no deference." *Id.* at 970. Elsewhere in the opinion, the court also cited cases holding that an administrative agency's determination of an issue of law is relevant, but not binding. *Id.* at 965. The court in *Branson* thus ignored or implicitly rejected the more deferential *de novo* standard previously applied in some administrative law cases. See *supra* notes 187–191.

242. *Branson*, 659 N.E.2d at 970.

243. *See* O'Neill & Brody, *supra* note 6.

244. 659 N.E.2d at 970.

245. By use of this term, the court presumably meant basic or historical facts. *See supra* note 96–97 and accompanying text.

246. 659 N.E.2d at 970.

247. *Id.*

statement in the record below that her ruling was based on the "relatively liberal construction" given the term "wilful" in Illinois judicial opinions.[248]

Finding that this reference by the administrative law judge to liberal statutory construction supported an "inference" that a mixed question of fact and law was posed, the supreme court concluded that the degree of judicial deference given to the agency's determination of willfulness should not be identical to the deference accorded to either a "pure issue of fact" or a "pure issue of law."[249] The court did not, however, provide any further guidance as to what level of deference *should* appropriately be accorded the mixed question of "willfulness." Instead, the court acquiesced in the parties' original assumption that the issue was governed by the manifest weight of the evidence standard and devoted the rest of its opinion in *Branson* to a discussion of whether that traditional standard had been met.[250]

In light of the supreme court's ultimate reliance on the manifest weight of the evidence rule in *Branson*, the court's dicta concerning mixed questions seemed at first glance to be gratuitous. Moreover, the court's very general observations on the appropriateness of a different standard of review for mixed questions of fact and law left open the key question of what that standard should be. The court did refer in a citation to Professors O'Neill and Brody's 1995 article and its discussion of the "arising out of and in the course of employment" issue from workers' compensation cases.[251] But the Illinois workers' compensation cases cited in the article did not recognize the existence of a mixed question, and instead treated the "arising out of" issue as a question of pure fact subject to the manifest weight of the evidence standard.[252] Although Professors O'Neill and Brody argued in their article that the earlier workers' compensation cases were flawed and that the cases actually presented mixed questions of fact and law, the authors did not expressly advocate the adoption of a particular standard of review for such questions in civil cases.[253] Thus, the authorities cited by the *Branson* court

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248. *Id.*

249. *Id.*

250. *Id.* at 970–71. The supreme court upheld the appellate division's ruling that the agency's imposition of penalty liability for some of the months of unpaid taxes was against the manifest weight of the evidence. The supreme court also affirmed the appellate division's holding that the evidence *was* sufficient to support the agency's imposition of penalty liability for the remaining months in question. *Id.*

251. O'Neill & Brody, *supra* note 6, at 518 & n. 55.

252. *Id.*

253. *Id.* at 518. Rather, the authors advocated increased attention to the issue of standards of review by courts and litigants alike. *See supra* notes 2–12 and accompanying text.

gave little indication of how the court's recognition of the existence of mixed questions might affect the standard of review applicable to such questions.

Despite its relatively terse and tentative nature, the supreme court's opinion in *Branson* constituted an implicit invitation to future litigants and courts to raise the issue of a new and different standard of review applicable on appeal for mixed questions of fact and law. Picking up on this invitation in another administrative law case three years later, the Illinois Supreme Court expressly held in *City of Belvidere v. Illinois State Labor Relations Board*[254] that mixed questions of fact and law should be reviewed under an intermediate standard falling between the traditional manifest weight of the evidence standard and the *de novo* standard. In so doing, the court adopted a "clearly erroneous" standard of review, but did not define the scope of that standard.

In *City of Belvidere*, a local firefighters union filed an unfair labor practice charge with the Illinois State Labor Relations Board against the City of Belvidere, protesting the city's decision to contract with a private ambulance company to provide paramedic services for the city.[255] The union claimed that the city's decision involved a mandatory subject of collective bargaining under Section 7 of the Illinois Public Labor Relations Act (the "IPLR Act")[256] and that the city had improperly refused to negotiate with the union.[257]

After hearings, an administrative law judge ruled that the city's decision was not a mandatory subject of collective bargaining, and therefore the city's refusal to bargain with the union before entering into the contract was not an unfair labor practice.[258] The firefighters' union filed exceptions to the labor relations board, contesting the administrative law judge's recommended

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254. 692 N.E.2d 295 (Ill. 1998)

255. 692 N.E.2d at 297–99.

256. 5 ILL. COMP. STAT. ANN. 315/7 (West 1994). Section 7 of the IPLR Act sets out circumstances under which a public employer in Illinois has a duty to engage in collective bargaining with a labor organization that is acting as exclusive representative of a unit of public employees. Section 7 states in relevant part that "[a] public employer and the exclusive representative have the authority and the duty to bargain collectively . . . '[T]o bargain collectively' means . . . to negotiate in good faith with respect to wages, hours, and other conditions of employment, not excluded by Section 4 of this Act." *Id.* Section 4 of the IPLR Act provides that public employers are not required to bargain over "matters of inherent managerial policy," but are required to bargain collectively as to policy matters directly affecting "wages, hours and terms and conditions of employment." 5 ILL. COMP. STAT. ANN. 315/4 (West 1994).

257. 692 N.E.2d at 300–01. Section 10(a)(4) of the IPLR Act provides that it is an unfair labor practice "to refuse to bargain collectively in good faith with a labor organization which is the exclusive representative of public employees in an appropriate unit . . . ." 5 LL. COMP. STAT. 315/10(a)(4) (2003).

258. *Id.* at 300.

decision and order.[259] The board disagreed with the administrative law judge, finding that the city's decision was subject to mandatory bargaining, and therefore the city of Belvidere had committed an unfair labor practice by not first negotiating the decision with the union.[260]

On appeal, the appellate court reversed the board on the ground that the city's decision did not affect wages, hours or other conditions of the union members' employment and therefore was not a mandatory subject of collective bargaining.[261] In so ruling, the appellate court treated the issue on appeal as a question of law. After pointing out that administrative determinations of issues of law are not entitled to the same deference as administrative findings of fact, the court acknowledged that an appellate court should nevertheless give substantial deference to a statutory interpretation by an administrative agency unless it is "clearly wrong."[262] Upon completion of its review of the record and the board's ruling, the appellate court concluded that the board was in fact "clearly wrong."[263]

The Illinois Supreme Court, with one justice dissenting, affirmed the appellate court's ruling setting aside the decision and order of the board.[264] In an opinion written by Justice Bilandic, the court agreed that the central issue was whether the city's decision to provide paramedic services through private contract affected "wages, hours or other conditions of employment" of the union firefighters under Section 7 of the IPLR Act.[265] But the supreme court rejected the appellate court's characterization of the issue as a question of law. The court also elected not to treat the board's findings on this issue as findings of "fact" subject to review under the traditional manifest weight of the evidence rule. Instead, the supreme court decided as a threshold matter that the board's determination of this question would be treated under a less deferential standard than manifest weight of the evidence. Explaining why, the court reasoned that the board's finding was partly factual "because it involves considering whether the facts in this case support a finding that the [c]ity's decision affected wages, hours and other conditions of employment."[266] On

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259. *Id.*; City of Belvidere v. Ill. State Labor Relations Bd., 670 N.E.2d 337, 341 (Ill. App. 2d Dist. 1996).

260. 692 N.E.2d at 300. The labor relations board rescinded the contract with the private ambulance company and ordered the City to bargain with the firefighters over paramedic services. *Id.* at 301.

261. 670 N.E.2d 337.

262. *Id.* at 341 (citing Freeport v. Ill. State Labor Relations Bd., 554 N.E.2d at 163–64).

263. 670 N.E.2d at 343–45.

264. 692 N.E.2d at 305.

265. *Id.* at 301.

266. *Id.* at 302.

the other hand, the court observed that the board's decision also raised a question of law "because the phrase 'wages, hours and other conditions of employment' is a legal term that requires interpretation."[267] Because the case involved "an examination of the legal effect of a given set of facts," the court concluded that the board's determination of the key issue was "best considered" a mixed question of fact and law.[268]

Having rejected application of the traditional *de novo* and manifest weight standards, the Illinois Supreme Court decided that the appropriate standard of review should be in between these standards "so as to provide *some deference* to the Board's experience and expertise."[269] Accordingly, the court held that the board's decision would be reviewed under a "clearly erroneous" standard.[270] Without further explanation of that standard, the court turned to the merits of the case and ultimately held that the Board's determination was clearly erroneous.[271]

The reasoning of *City of Belvidere* is somewhat confusing and left several key questions unanswered. First, the Illinois Supreme Court did not define "clearly erroneous," nor did it state whether or not it intended to adopt the federal definition of the term. In support of its decision to change or clarify the standard of review, the court again cited generally to the 1995 article by Professors O'Neill and Brody, as it had in *Branson*.[272] Because that article discusses the federal definition of "clearly erroneous," one might thus have inferred that the supreme court intended to adopt the federal standard.[273] But

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267. *Id.* Unlike its approach in *Branson*, the supreme court did not point to a specific section of the record where the administrative law judge or agency referred to the question in the proceedings below as one of legal interpretation. *See supra* text accompanying note 248.

268. 692 N.E.2d at 302.

269. *Id.* (emphasis added).

270. *Id.*

271. *Id.* at 305.

272. O'Neill & Brody, *supra* note 6, at 512.

273. That inference is weakened, however, by the fact that Professors O'Neill and Brody describe the federal standard in connection with a discussion of the difference between the standard of review applicable to findings of fact by juries and that applicable to findings by trial courts. *Id.* at 515. As previously noted, the O'Neill and Brody article does not advocate the adoption of a clearly erroneous standard for mixed questions in civil cases. In fact, the article seems to indicate that a *de novo* standard should be applied to many mixed questions in criminal cases. *See id.* To add to the confusion, the appellate courts in Illinois have at times used the phrase "clearly erroneous" to describe the standard of review applicable to administrative agency interpretations of law. *See, e.g.*, Chicago Transit Auth. v. Amalgamated Transit Union, 702 N.E.2d 284, 289 (Ill. App. Ct. 1998) (agency interpretation of act should be overturned only if it is "clearly erroneous" or constitutes abuse of discretion); Archer-Daniels-Midlands Co. v. Ill. Commerce Comm'n, 687 N.E.2d 1144, 1148 (Ill. App. Ct. 1997) (agency's interpretation of its own rules will not be interfered with by courts unless "clearly erroneous, arbitrary or unreasonable").

that inference is difficult to square with the court's expressed intent in *City of Belvidere* to accord "some deference" to the administrative agency's determination, given that the findings of federal district courts are subject to the federal "clearly erroneous" standard, which generally gives substantial deference to federal courts' findings.[274] Moreover, in analyzing why the private ambulance contract in *City of Belvidere* did not affect wages, hours or conditions of employment, the court appeared in practice to give little, if any, deference to the board's determination, which also seems inconsistent with the federal clearly erroneous standard.[275] In fact, the supreme court's decision in *City of Belvidere* seemed to engage in a rather detailed analysis and determination of the basic facts in the record that was arguably more consistent with *de novo* review than with an intermediate standard.[276]

The *City of Belvidere* opinion also did not explain why the supreme court elected to follow the lead of those federal courts that apply the clearly erroneous standard of review to mixed questions of fact and law instead of opting to follow those federal courts that review most mixed questions *de novo*.[277] Had the supreme court chosen *de novo* review of administrative agency determinations of mixed questions of fact and law, for example, it could then have continued to exercise its discretion to accord agency determinations

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274. *See supra* Part I.C.2.

275. The court appeared to consistently downplay or re-characterize the facts on which the board relied in making its determination and emphasized other facts from the record. For example, the board had determined that the city's decision to subcontract paramedic services to a private company adversely impacted the firefighters' conditions of employment by causing them to respond to fewer emergency calls. 692 N.E.2d at 299. Based on its review of the record, the supreme court found, however, that the firefighters' conditions of employment were *not* adversely affected. The firefighters continued to provide some emergency services even though they had lost dispatch priority, and no facts indicated any elimination of positions or reduction in hours and wages. *Id.* at 304. In dissent, Justice Harrison wrote that "the majority shows no deference whatever to the Board's experience and understanding of bargaining. Purporting to employ a 'clearly erroneous' standard, what the majority does is simply substitute its own judgment for that of the Board." 692 N.E.2d at 305.

276. To determine whether the city's decision to contract with a private ambulance service affected wages, hours and employment conditions, the supreme court applied a multi-factor test derived from *Westinghouse Electric Corp.*, 150 N.L.R.B. 1574 (1965). *See City of Belvidere*, 692 N.E.2d at 304–05. The court found that the contract did not affect wages, hours and employment conditions under the *Westinghouse* test, and accordingly held that the board's decision reaching the opposite conclusion was clearly erroneous. *Id.* at 305.

277. *See supra* Part II.C. In the O'Neill and Brody article cited by the court, the authors noted that the federal appellate courts were "deeply divided" over whether to apply the clearly erroneous or *de novo* standards to mixed questions. O'Neill and Brody, *supra* text accompanying note 6, at 514. As discussed *supra* notes 165–172, other federal appellate courts apply a bifurcated analysis and some apply a flexible functional analysis. The supreme court in *City of Belvidere* did not discuss either of those alternative approaches.

"some" or even "substantial" deference in a manner consistent with many of the court's own prior decisions.[278] Thus, articulation of an ill-defined new standard of review for mixed questions seemed unnecessary.

The *City of Belvidere* opinion was also silent as to why the Illinois Supreme Court chose a standard of review for state administrative law cases that seemed to be based on the federal standard of appellate review for factual determinations by federal *trial courts* in non-jury cases. This choice seems particularly curious in light of the fact that the federal standard of review for administrative agency determinations of both findings of fact and mixed questions is normally the substantial evidence test, which is generally considered to be more deferential than the clearly erroneous rule.[279]

Finally, the *City of Belvidere* opinion did not clearly indicate whether the supreme court intended to apply the clearly erroneous standard of review in the future to all mixed questions of fact and law, to all administrative agency determinations of mixed questions, or only to some administrative determinations.[280] On the one hand, a very broad reading of the case might support the view that the court intended an eventual full-scale change in the standard of review for all mixed questions raised on appeal (except, presumably, in the case of jury determinations). The court's citation of the O'Neill and Brody article in *City of Belvidere* lends some support to such an expansive reading, as does the court's reliance on *Branson*.[281]

Reading the *City of Belvidere* case more narrowly, however, it could be argued that the court was simply interpreting the scope of the statute governing judicial review of many administrative determinations and was not addressing mixed questions in all types of cases. For example, the court began its discussion of the standard of review in *City of Belvidere* by explaining that judicial review of the labor relations board's decision is governed by Section 3–110 of the Administrative Review Law, which provides that judicial review of the record of administrative agency determinations extends to all questions of law and fact.[282] The court also noted that Section 3–110 states that

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278. This was the approach taken by the appellate court in *City of Belvidere*. *See supra* text accompanying note 262; *see also supra* notes 186–194 and accompanying text.

279. *See supra* Part I.C. As discussed *supra* at notes 40–45, the standard of federal appellate review of administrative agency interpretations of law is also often deferential.

280. *See infra* notes 350–352 and accompanying text.

281. Both the O'Neill & Brody article and *Branson* cited approvingly to mixed question cases that did not involve interpretations of the Administrative Review Law. *See supra* notes 251–52 and accompanying text; *infra* note 351.

282. 735 ILL. COMP. STAT. ANN. 5/3–110 (West 1994). Section 3–110 of the Administrative Review Law applies to determinations by the labor relations board pursuant to Section 11(e) of the IPLR Act. 5 ILL. COMP. STAT. ANN. 315/11(e) (West 1994). Section 3–110 states:

administrative findings of fact under that section are deemed to be *prima facie* true and correct.[283] After implicitly equating the *prima facie* true and correct rule with the manifest weight of the evidence rule,[284] the supreme court compared these traditional standards with the standards for judicial review of administrative determinations of questions of law, which the court observed are treated with "less deference" and are "not binding" on a reviewing court.[285] The court then analyzed why the question on appeal was a mixed question of fact and law, citing only to the *Branson* case.[286] *Branson* also arguably involved an interpretation of the Administrative Review Act;[287] therefore, one reading of the two cases is that the supreme court intended to apply its intermediate standard of review for mixed questions to *all* administrative agency determinations under the Administrative Review Act.[288]

Yet, in any number of administrative law cases decided before *Branson* and *City of Belvidere*, both the supreme court and the intermediate appellate courts had reviewed issues that seemed to present mixed questions of fact and law under traditional, albeit inconsistent, standards, at times applying the *de novo* standard and at times the manifest weight of the evidence standard.[289] Despite the relatively broad language employed in *Branson* and *City of*

> Scope of review. Every action to review any final administrative decision shall be heard and determined by the court with all convenient speed. The hearing and determination shall extend to all questions of law and fact presented by the entire record before the court. No new or additional evidence in support of or in opposition to any finding, order, determination or decision of the administrative agency shall be heard by the court. The findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct.

See supra note 203.

283. 35 ILL. COMP. STAT. ANN. 5/3–110 (West 1994); 692 N.E.2d at 302. *See supra* note 203.

284. City of Belvidere v. Ill. State Labor Relations Bd., 692 N.E.2d 295, 302 (Ill. 1998). Citing the *Abrahamson* and *City of Freeport* cases, the court explained that factual determinations by administrative agencies are against the manifest weight of the evidence "where the opposite conclusion is clearly evident." *Id.* *See supra* notes 204–211 and accompanying text.

285. Unlike the appellate court's decision and Justice Harrison's dissent, the supreme court in the majority opinion in *City of Belvidere* did not refer to its prior cases according substantial deference to statutory interpretations by administrative agencies. *See supra* notes 187–189 and accompanying text.

286. 659 N.E.2d 961. As indicated *supra* note 272 and accompanying text, the court also included a *see generally* citation to the O'Neill and Brody article, *supra* note 6, which discusses the standard of review in a variety of civil and criminal cases.

287. *See* 659 N.E.2d at 969–970 (discussing permissible scope of judicial inquiry into administrative fact finding under Administrative Review Law).

288. *See infra* note 351 and accompanying text.

289. *See supra* notes 232–233 and accompanying text.

Belvidere, it was by no means clear from the two opinions that the court intended to overrule that entire body of precedent. Thus, an even narrower reading of *City of Belvidere* would limit the holding to the particular administrative issues on appeal. In short, the case could be read by litigants and appellate courts in a variety of ways.[290]

B. *AFM Messenger Service* and *Carpetland* Raise New Questions

Perhaps recognizing the gaps in its reasoning in *City of Belvidere*, the Illinois Supreme Court revisited[291] the issue of appellate review of mixed questions of fact and law in 2001 and 2002 in *AFM Messenger Service v. Department of Employment Security*[292] and *Carpetland U.S.A., Inc. v. Illinois Department of Employment Security*.[293] Both cases involved challenges to administrative agency determinations that personnel retained by corporations were employees rather than "independent contractors," thereby triggering the corporations' obligation to contribute to the state unemployment insurance program. Although the two cases clarified some of the questions left open in *City of Belvidere*, they left other significant questions unanswered.

1. AFM Messenger Service

The first post-*City of Belvidere* case decided by the Illinois Supreme Court heralded a significant retreat from the court's earlier decision to give only "some deference" to Illinois administrative agency determinations of

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290. Following the *City of Belvidere* decision, some intermediate appellate courts in Illinois attempted to resolve some of these uncertainties by delineating and applying the clearly erroneous standard. In doing so, the courts turned to Rule 52(a) of the Federal Rules of Civil Procedure and cases construing the phrase "clearly erroneous." *See, e.g.*, Rogy's New Generation, Inc. v. Dep't of Revenue, 742 N.E. 2d 443 (Ill. App. Ct. 2000); Rudolph St. Galler v. Zehnder, 735 N.E.2d 100 (Ill. App. Ct. 2000); Friends of Israel Def. Forces v. Dep't of Revenue, 733 N.E.2d 789 (Ill. App. Ct. 2000).

291. Following *City of Belvidere*, the Illinois Supreme Court also considered the issues surrounding the applicable standard of review for mixed questions of fact and law in two criminal cases raising constitutional issues: *In re G.O.*, 727 N.E.2d 1003 (Ill. 2000), and *People v. Crane*, 743 N.E.2d 555 (Ill. 2001). In those cases, the court implicitly rejected the manifest weight and clearly erroneous standard and instead adopted a two-tiered analysis. Under that analysis, the underlying historical facts are reviewed under the manifest weight of the evidence standard of review, but the application of the law to the facts is reviewed *de novo*. *See, e.g.*, 727 N.E.2d at 1008–10.

292. 763 N.E.2d 272 (Ill. 2001).

293. 776 N.E.2d 166 (Ill. 2002).

mixed questions of fact and law.[294] In *AFM Messenger Service*, the court for the first time expressly adopted the relatively deferential federal standard of review for findings of fact by federal trial courts under Rule 52(a) of the Federal Rules of Civil Procedure and held that it applied to Illinois administrative agency determinations of mixed questions of fact and law.[295] In so doing, the court gave a partial explanation of its reasons for departing from its past practice of reviewing such determinations under a *de novo* or manifest weight of the evidence standard.

The issue on appeal in *AFM Messenger Service* was whether the drivers for a delivery service company were "independent contractors" under section 212 of the Illinois Unemployment Insurance Act ("IUIA"), thereby exempting the company from the obligation to make unemployment contributions on behalf of the drivers. To meet its burden of proof that it was exempt under the IUIA, the delivery service company had to establish, among other criteria, that the company's drivers were engaged in "an independently established trade, occupation, profession, or business."[296]

Following administrative hearings in two separate cases, the Illinois Department of Employment Security determined that AFM Messenger Services had failed to meet its burden of proof. Holding that the drivers were employees and did not meet the definition of independent contractor, the department found the delivery service liable for unpaid unemployment insurance contributions relating to the drivers' employment.[297] The agency's decisions were affirmed on administrative review by the circuit court, which held that the decisions were "neither against the manifest weight of the evidence nor contrary to law."[298] On appeal of the circuit court's decision, the appellate court affirmed,[299] this time applying the clearly erroneous standard of review from *City of Belvidere*.[300]

The Illinois Supreme Court affirmed the appellate court's decision. In an opinion written by Justice Fitzgerald, the court began its analysis in *AFM*

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294. *See supra* text accompanying note 269.

295. The *City of Belvidere* decision only adopted the Rule 52(a) standard implicitly. *See* text accompanying notes 272–274 *supra*.

296. 763 N.E.2d at 283 (citing 820 ILL. COMP. STAT. ANN. 405/212 (West 2000)).

297. 763 N.E.2d at 274.

298. *Id.* at 277–278.

299. The two cases against AFM Messenger Service were consolidated on appellate review. For ease of reference, this article follows the court's example by referring to the two administrative decisions collectively as the department's decision or the agency's determination. *Id*. at 279 n. 1.

300. AFM Messenger Serv., Inc. v. Dep't of Employment Sec., 733 N.E.2d 749 (Ill. App. Ct. 2000).

Messenger Service with a lengthy discussion of the applicable standard of review. The court noted that the applicable standard depended on whether the issue on appeal was a question of fact, a question of law, or a mixed question of fact and law.[301] After referring to its own simple definition of a mixed question from *City of Belvidere*,[302] the supreme court cited with approval the longer, but more comprehensive, United States Supreme Court definition from *Pullman-Standard v. Swint*.[303] The court then concluded that the agency's determination that the AFM drivers were not independent contractors presented a mixed question of fact and law, using an analysis similar to that employed in *City of Belvidere*.[304]

Again citing *City of Belvidere* in support, the supreme court confirmed that administrative agency determinations of mixed questions of fact and law would be reviewed on appeal to determine if they were "clearly erroneous." The court conceded that the only guidance it had given in *City of Belvidere* as to the meaning of "clearly erroneous" was to place the concept on a continuum somewhere between the manifest weight and *de novo* standards.[305] Following the approach of some Illinois appellate courts subsequent to *City of Belvidere*,[306] the supreme court defined "clearly erroneous" by reference to Federal Rule of Civil Procedure 52(a),[307] expressly adopting the U.S. Supreme Court's interpretation of that rule in *United States v. Gypsum*.[308]

In contrast to its silence in *City of Belvidere*, the Illinois Supreme Court in *AFM Messenger Services* attempted to explain some of the reasons for its adoption of the clearly erroneous standard of review for administrative agency determinations of mixed questions of fact and law. Citing *Anderson v. Bessemer City*,[309] the court noted that the rationale for applying the deferential

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301. 763 N.E.2d at 279 (citing *City of Belvidere* and *Branson*).

302. *See supra* text accompanying note 268.

303. 456 U.S. 273 (1982). The Supreme Court stated in *Pullman-Standard v. Swint* that mixed questions of law and fact are "questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Id.* at 290 n.19.

304. 763 N.E.2d at 280. The court explained that the agency's decision was partly factual because it involved considering whether the basic facts supported the agency's determination that the AFM drivers were employees and not independent contractors. But, the agency's decision also involved a question of law because the three requirements for independent contractor status set forth in the statute were "comprised of legal terms and concepts requiring interpretation." *Id.*

305. *Id.*

306. *Id. See supra* note 290.

307. *Id.* at 280–81.

308. 333 U.S. 364, 395 (1948). *See supra* note 76 and accompanying text.

309. 470 U.S. 564, 574 (1985). *See supra* notes 77–79 and accompanying text.

clearly erroneous rule to findings of fact by federal trial judges is not limited to the trial judge's superiority in assessing credibility. The deference is also based on the expertise that accompanies the trial judge's fact-finding experience.[310]

The Illinois Supreme Court then explained that the rationale for the significant deference accorded findings by federal trial court judges under Rule 52(a) "is not unlike" the deference traditionally given by Illinois appellate courts to decisions by state administrative agencies.[311] Although it did not refer to its past patterns of deference to credibility determinations by administrative agencies,[312] the supreme court did emphasize its past acknowledgment of "the wisdom of judicial deference to an agency's experience and expertise."[313] The court cited a number of its own decisions dating back to 1988 and noted that even when its standard of review of an agency's interpretation of a statute was *de novo*, it nevertheless acknowledged the relevancy of the agency's views.[314] In conclusion, the supreme court observed that the clearly erroneous standard of review it adopted in *City of Belvidere* "parallels *in significant respects* the clearly erroneous standard under the federal rules."[315] Noting also that the United States Supreme Court's definition of "clearly erroneous" furnishes a "practical guide" for the application of the standard, the court held that "when the decision of an administrative agency presents a mixed question of law and fact, the agency decision will be deemed 'clearly erroneous' only where the reviewing court, on the entire record, is 'left with the definite and firm conviction that a mistake has been committed.'"[316]

The Illinois Supreme Court's opinion in *AFM Messenger Service* seemed to narrow the potential impact of *City of Belvidere* substantially. First, in attempting to pinpoint where on the continuum of judicial deference the clearly erroneous rule lay, the court characterized the rule as "significantly

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310. 763 N.E.2d at 281. *See supra* notes 126–127 and accompanying text.

311. *Id.*

312. *See supra* text accompanying notes 227–228.

313. 763 N.E.2d at 281.

314. *Id. See supra* notes 186–194 and accompanying text.

315. 763 N.E.2d at 281–82 (emphasis supplied). It is not clear from the decision what the court meant by "in significant respects," but the phrase seems to leave open the possibility of deviations from the federal standard of review.

316. 763 N.E.2d at 282 (citing United States v. Gypsum Co., 333 U.S. 364, 395 (1948)). After reviewing the administrative agency record in *AFM Messenger Service* and analyzing prior decisions raising the issue of whether alleged independent contractors were engaged in an independent trade, occupation, profession, or business, the supreme court held that the administrative agency's determination that the messenger service's drivers were not independent contractors was not clearly erroneous. 763 N.E.2d at 289.

deferential"[317] and "largely deferential."[318] In so doing, the court sharply backed away from its decision in *City of Belvidere* to give only "some deference" to the agency.[319] Nevertheless, the court added that a "largely deferential" standard does not mean that a court reviewing an administrative agency decision must "blindly defer" to that decision.[320]

The *AFM Messenger Service* opinion also clarified some issues left unanswered in *City of Belvidere*. For example, the court finally defined what it meant by "clearly erroneous."[321] Using a functional analysis, the court also attempted to explain why the deferential federal rule for findings of fact by federal district court judges should be applied to state administrative agency determinations.[322] Nevertheless, the court continued its silence as to *why* it had decided to replace its traditional standards of review for mixed questions.[323] The court also failed to explain why it continued to implicitly reject the extremely deferential federal approach to reviewing administrative agency determinations of mixed questions in favor of an intermediate standard. In short, the underlying policy reasons for the Illinois Supreme Court's decision to change Illinois standards of review were still not clear.

AFM Messenger Service also left open the question of the scope of the new standard of review. Although the court again used broad language that seemed to confirm that the clearly erroneous standard would be applied to *all*

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317. 763 N.E.2d at 281 (citing Concrete Pipe & Products of Cal., Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602, 623 (1993)).

318. 763 N.E.2d at 282.

319. One is tempted to reconcile the supreme court's decisions by concluding that administrative agency determinations favoring unions are given only some deference, while agency determinations favoring revenue collection are given substantial deference. *See* 692 N.E.2d at 305 (Justice Harrison, dissenting). To the extent that Illinois appellate courts review the determinations of some administrative agencies with more scrutiny than others, they are not unique. *See* 2 CHILDRESS & DAVIS, *supra* note 7, §14.01, at 14–3 (observing that the federal courts favor some agencies and not others).

320. 763 N.E.2d at 282 (citing its reversal of the administrative agency decision in *City of Belvidere*).

321. *Id.*

322. *Id.* at 281. Although the court used a functional analysis and analogy to explain why it was applying a federal standard applicable to findings by district judges, it did not explain why functional factors supported adoption of an *intermediate* deferential standard, rather than the traditional and more deferential manifest weight of the evidence standard.

323. The court acknowledged its prior decisions applying the manifest weight of the evidence standard to apparent mixed questions of fact and law. The court noted, however, that those decisions predated *City of Belvidere*, and that the parties in the earlier cases had not raised the possibility that the determinations under review involved mixed questions. 763 N.E.2d at 282. Nevertheless, the court did not expressly overrule the prior decisions and seemed to leave open the possibility that parties could opt for a more or a less deferential standard of review in a particular case.

administrative agency decisions involving mixed questions of fact and law,[324] both broader and narrower interpretations of the case were still viable.[325]

2. Carpetland

In its next pronouncement concerning mixed questions of fact and law, the Illinois Supreme Court raised, but did not clearly answer, a question that had been broached in the intermediate appellate courts: whether mixed questions of fact and law should be freely reviewed on appeal when the basic facts in the case are undisputed.[326] Although the *Carpetland* case purported to apply the clearly erroneous standard of review to a mixed question, the court's searching review of the administrative record and its discussion of how the statutory test applied to the facts also suggested that the court was in reality reviewing the administrative agency determination *de novo.*

In *Carpetland*, the issue on appeal was whether floor measurers and carpet installers retained by Carpetland U.S.A., a retailer of floor coverings, were independent contractors or employees under the Illinois Unemployment Insurance Act.[327] After a hearing by a representative of the Department of Employment Security, the director of the department adopted the hearing officer's report and ruled that the measurers and installers were employees, thereby triggering the company's obligation to pay unemployment insurance contributions.[328] The circuit court affirmed this decision.[329]

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324. As it did in *City of Belvidere*, the supreme court began its analysis in *AFM Messenger Service* by discussing the Administrative Review Law. 763 N.E.2d at 279. See *supra* notes 281–284 and accompanying text. Although the court's discussion of the statute seems to imply a standard of broad applicability, it is still not completely clear whether the *City of Belvidere* and *AFM Messenger Service* decisions apply to all administrative agency determinations of mixed questions decided under the act or only to some agency determinations. *See infra* notes 350–51 and accompanying text.

325. Neither *City of Belvidere* nor *AFM Messenger Service* foreclosed the possibility that some mixed questions might continue to be addressed under a *de novo* standard of review. Thus, the court may intend for the appellate courts to decide whether to apply the clearly erroneous standard on a case-by-case basis, even in administrative agency cases. Conversely, the court may eventually decide expressly that the clearly erroneous standard applies to all or most administrative agency and circuit court determinations of mixed questions. *See infra* notes 350–51 and accompanying text.

326. *See, e.g.*, Chicago Patrolmen's Ass'n v. Dep't of Revenue, 664 N.E.2d 52 (Ill. 1996) (agency determination whether property is tax exempt is reviewed *de novo* when the facts are not in dispute).

327. 776 N.E.2d 166, 169 (Ill. 2002). As in *AFM Messenger Service*, the court was reviewing an administrative agency action under the Illinois Unemployment Insurance Act, 820 ILL. COMP. STAT. ANN. 405/212 (West 2000). See *supra* note 296 and accompanying text.

328. 776 N.E.2d at 169.

329. *Id.*

When the case reached the Illinois Supreme Court,[330] the parties agreed that the clearly erroneous standard of review applied to the issue on appeal. At oral argument, however, the question was raised whether the *de novo* standard was more appropriate because the facts were "essentially undisputed."[331] The Department of Employment Security argued that *City of Belvidere* "departed" from prior cases reviewing the application of law to undisputed facts under a *de novo* standard. In a cryptic response, the supreme court disagreed, stating: "[I]n *City of Belvidere*, we did not entirely abandon the *de novo* standard in administrative review cases."[332]

The court nevertheless went on to state that the clearly erroneous standard applied to the issue of whether the workers in *Carpetland* were independent contractors, following the precedent set in *AFM Messenger Service*.[333] In explaining its decision in the latter case, the court stated that "[u]nder the clearly erroneous standard, we give *somewhat less deference* to the agency than we would if the decision related solely to a question of fact, because the decision is based on fact-finding that is inseparable from the application of law to fact."[334] After an extensive discussion of the facts in the record, the statutory and regulatory standards, and the court's prior cases interpreting those standards, the court held that the Department of Employment Security's decision that Carpetland's installers were employees was clearly erroneous; however, the department's similar decision concerning the company's floor measurers was not.[335]

In several instances in the *Carpetland* opinion, the supreme court appeared to substitute its own determinations of "pure" or basic facts for those

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330. Applying the clearly erroneous rule, an intermediate appellate court had reversed the circuit court decision, with one judge dissenting. Carpetland U.S.A., Inc. v. Ill. Dep't of Employment Sec., 746 N.E.2d 738 (Ill. App. Ct. 2001).

331. 776 N.E.2d at 177. *See supra* note 233. Following *City of Belvidere*, some appellate courts continued to conduct *de novo* review of mixed questions based on undisputed or stipulated facts. *See, e.g.*, Blessing/White, Inc. v. Zehnder, 768 N.E.2d 332, 343 (Ill. App. Ct. 2002) (where the parties stipulated to the facts and no further fact findings had to be drawn, the agency's determination based on facts was to be reviewed *de novo*).

332. 767 N.E.2d at 177.

333. *Id*. The supreme court in *Carpetland* explained that "[u]nder some circumstances . . . the issue presented cannot be accurately characterized as either a pure question of fact or a pure question of law and therefore will be treated as a mixed question, subject to an intermediate standard of review." *Id.*

334. *Id*. (emphasis added).

335. *Id.* at 192. Justices McMorrow and Freeman dissented in part from the opinion of the majority of the court, written by Justice Garman. The dissenting justices would have affirmed the administrative agency's determination that both the floor installers and floor measurers were employees of Carpetland, rather than independent contractors. *Id.* at 193–95.

of the administrative agency.[336] In other instances, the court drew inferences from basic facts that were directly opposite to those drawn by the agency.[337] In yet other instances, the supreme court rejected the agency's legal interpretations of the governing statute and prior case law.[338] In performing all of these functions, the court purported to be acting under the clearly erroneous rule. Yet it is difficult to escape the impression that the court was in actuality reviewing the case *de novo.*

The reasons behind the Illinois Supreme Court's unwillingness to expressly revert to a *de novo* standard of review in *Carpetland* are not clear. As in *Branson*,[339] the court may have been acceding to the parties' original characterization of the appropriate standard of review. Or, despite the existence of ostensibly "undisputed" facts, the court may have been reluctant to apply a different standard of review to a mixed question of fact and law so soon after it had announced the clearly erroneous rule. Alternatively, the court may have been concerned that the premise of the proffered "undisputed facts" exception to the clearly erroneous rule was not met because some of the basic facts in *Carpetland* actually *were* in dispute.[340] Regardless of the reason for the court's apparent reluctance to announce an exception to its relatively new clearly erroneous rule, the court did little in *Carpetland* to resolve many of the

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336. For example, the agency had found that all complaints about carpet installation flowed through Carpetland. Pointing to testimony by one carpet installer that he left his business card with customers to facilitate customer reports of problems, the supreme court concluded that communications through the company were "only one means" by which customers could register complaints. *Id.* at 178.

337. The agency had, for example, based an inference of employer control on the fact that the carpet installers had attempted to make themselves available for "any and all" Carpetland work assignments. The court found that this fact indicated ambition, not direction or control. *Id.* at 181.

338. For example, the court analyzed prior cases interpreting the phrase "usual course of business" and concluded that the key to the inquiry is whether services are necessary to a business or merely incidental. *Id.* at 186. At another point in the decision, the court rejected two of the agency's proffered legal tests for determining whether a customer's premises should be considered part of Carpetland's place of business. *Id.* at 188.

339. 659 N.E.2d at 961. *See supra* text accompanying note 250.

340. Although it preceded its discussion by characterizing the facts as "essentially" undisputed, for example, the court began its analysis by identifying at least six "misstatements of fact" in the hearing officer's report. *Id.* at 178. Concluding that the report was neither complete nor reliable, the court looked to the record as a whole, as well as to the report, for "relevant underlying facts" to support its decision. *Id.* Elsewhere in the opinion, the court noted that its finding of misstatements was based on a "thorough review" of the record. The court also observed that the hearing officer did not question the credibility of any of the witnesses. *Id.* In addition to criticizing the agency's fact-finding, the court was critical of the fact that the hearing officer included legal conclusions in the report without supporting authority, *id.*, and failed to address each of the relevant factors for control under the Administrative Code, *id.* at 180.

questions raised in *City of Belvidere* and *AFM Messenger Service* about the full purpose and future applicability of the new intermediate standard of review for mixed questions. This raises the pivotal question: What is the supreme court ultimately trying to achieve with its adoption of a new standard of review for at least some mixed questions of fact and law?

V. POST *CARPETLAND* REFLECTIONS

Whether approached at the federal or the state level, standards of review serve in large part as a critical mechanism for allocating power and responsibility among the various actors making judicial determinations.[341] As discussed in Part II.A., however, utilization of the traditional concepts of "fact" and "law" to decide whether the original decision maker or the reviewing court has primary power and responsibility to decide a particular issue often hides an inherently uncertain, and ultimately arbitrary, process. Recognizing a third category of mixed questions helps to unveil that process, but creates its own uncertainties.[342] Courts and commentators hence increasingly advocate express use of a functional analysis to provide principled grounds to support and supplement the traditional fact/law approach to allocating decision-making power and responsibility.[343]

It should also be noted that standards of review act as messengers. For example, they convey to litigants the likelihood of reversal on appeal, thereby affecting litigants' decisions whether or not to appeal and their selection of issues to raise on appeal.[344] At the same time, standards of review serve as signals to reviewing courts that, over time, certain outcomes on appeal are desirable. In the federal administrative law context, for example, Professor Verkuil has pointed out that "one might reasonably expect that Congress wants outcomes, defined in terms of affirmances, remands, and reversals of agency actions, to vary according to the scope of review chosen (or at least to find

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341. *See* text accompanying note 20 *supra*.

342. *See* Part II.C. *supra*.

343. *See* Part II *supra*. There seems to be a general consensus that the traditional linguistic or definitional approach to standards of review should be supplemented, not completely abandoned. *See, e.g.*, Calleros, *supra* note 74, at 417 (the literary or analytical approach is "useful primarily to facilitate discussion" by assigning convenient terms with which to discuss the applicability of the clearly erroneous rule); Sward, *supra* note 74, at 3 ("categorization allows a rough judgment of the level of deference required").

344. *See, e.g.*, URSULA BENTELE & EVE CARY, APPELLATE ADVOCACY: PRINCIPLES AND PRACTICE 85 (3d ed. 1998) (discussing how standards of review give signals to advocates as to how to approach a case on appeal or whether to appeal at all).

some judicial recognition of these expectations)."[345] Similarly, a state legislature, high court, or other rule-maker is often sending a signal (whether consciously or not) as to expected outcomes whenever it announces that a particular standard of review is applicable to a particular type of decision or issue, or to a particular decision-maker.[346] To be optimally effective as signals, however, standards of review ideally need to be clear and capable of easy and consistent interpretation and application. It is in this respect that Illinois law continues to fall short.

Despite improvements in some areas,[347] the Illinois Supreme Court continues to provide confusing and uncertain guidance with respect to standards of review. As described in Part IV, one of the major developments in this regard is the line of cases from *Branson* to *Carpetland* that has introduced a new area of uncertainty as to the treatment of mixed questions)at a time when lingering questions exist as to the meaning and scope of the traditional Illinois standards of review for questions of "fact" and

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345. Verkuil, *supra* note 38, at 682. The actual outcome of the adoption of a particular standard of review can, however, be difficult to predict. In his recent study of the results of appeals of several types of federal administrative agency determinations subject to differing standards of appellate review, Professor Verkuil found that the number of reversals of social security determinations seemed unusually high given the fact that they were reviewed on appeal under the very deferential substantial evidence standard of review. *See* Verkuil, *supra* note 38, at 704–06. He attributed the high reversal rate to a variety of factors, including "entrenched judicial skepticism" about the fairness or accuracy of agency determinations. *Id.* at 707. Conversely, the number of reversals of Freedom of Information Act requests seemed unusually low given the fact that they were reviewed *de novo* on appeal. *Id.* at 712–13. Again, Professor Verkuil viewed the outcome as attributable to a variety of factors. *Id.* at 713; 715–16. The number of reversals of two other forms of agency determinations were more consistent with Professor Verkuil's hypothesized rate of reversal and predictions. *Id.* at 710–11; 721–22. For a description of the "lessons" drawn from this outcomes analysis, see *id.* at 724–32.

346. The ultimate outcome of the adoption of the new "clearly erroneous" standard of review is not clear, and may depend on how far the standard is extended and whether particular mixed questions have traditionally been reviewed under the *de novo* or the manifest weight of the evidence standard of review. To the extent that mixed questions of fact and law have in the past been decided under the non-deferential *de novo* standard of review in Illinois, a shift to the deferential clearly erroneous standard could portend significantly more administrative determinations being *upheld* on appeal. If the more expansive reading of the cases prevails, it may also lead to more *affirmances* of circuit court determinations of mixed questions. To the extent that mixed questions of fact and law have in the past been reviewed under the very deferential manifest weight of the evidence standard, however, a potential shift to an almost universal imposition of the less deferential clearly erroneous standard may lead to at least marginally more *reversals* of determinations by administrative agencies and trial courts. *But see supra* note 345 (outcomes may be unpredictable).

347. *See, e.g.*, O'Neill, *High Court Climbs*, *supra* note 6 (concluding that the Illinois Supreme Court is "[s]tep by step . . . establishing fair and just standards of review for criminal appeals"). *See supra* note 291.

"law."[348] Although continued efforts to improve the treatment of the traditional standards would also be helpful, one of the paramount goals for the future should be to work toward clarification of the meaning, scope and applicability of the new clearly erroneous standard of review, for the reason that courts and litigants are not accustomed to dealing with it and are less familiar with the concept of mixed questions generally. Four steps that the Illinois Supreme Court might take to carry out this goal are suggested below.

First, it would be helpful to lower courts, agencies and litigants alike to have a better sense of what outcomes the supreme court was attempting to achieve when it adopted the clearly erroneous rule. In *City of Belvidere*, for example, was the supreme court attempting to encourage more appeals and more reversals of determinations by the State Labor Relations Board? If so, why? Or did the court just back into a change in standard of review out of irritation with the board's particular actions in the case, as the dissent suggests?[349] Even if the true reason for the adoption of a new standard of review lies in an affirmative answer to the last question, the resulting change need not be deemed quixotic or arbitrary if the court takes the opportunity in future cases)whether expanding or limiting the applicability of the new rule) to explain in further depth the purpose and rationale for treating mixed questions under an intermediate standard of review.

A second step would be to clarify the source of the clearly erroneous rule. Is it the result of an interpretation of the words "fact" and "law" in Section 3–110 of the Administrative Review Law?[350] If so, is that interpretation now applicable to *all* appeals of administrative agency determinations of mixed questions under the Administrative Review Law, or only to some categories

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348. *See* Part III *supra*.

349. *See supra* note 275.

350. The four principal cases analyzed in Part IV were all governed by Section 3–110 of the Administrative Review Law, which states that "findings and conclusions of the administrative agency on questions of fact shall be held to be prima facie true and correct." 735 ILL. COMP. STAT. ANN. 5/3–110 (West 2003). Although it refers in another sentence to "questions of law and fact," Section 3–110 does not specify the standard of review for either questions of law or mixed questions. *See supra* note 282. One possible source of the court's clearly erroneous rule is an implicit decision to treat mixed questions as "facts" that are subject to an alternative construction of the phrase "prima facie true and correct" (which has been interpreted in the past to refer to the manifest weight of the evidence standard). *See supra* note 203. Another potential source of the clearly erroneous rule is a discretionary ceding of the appellate courts' traditional power of *de novo* review over some or all administrative agency determinations of "law" in the form of mixed questions. *See supra* Part III.A. A third possibility is an implicit decision by the court to treat mixed questions as a separate category of determinations that falls within a gap in Section 3–110.

of determinations (as yet undefined) under that statute?[351] If the decision to review mixed questions in administrative cases under the clearly erroneous standard is essentially discretionary, what factors should guide the appellate courts in deciding whether and how to exercise that discretion?

A third important step would be to clarify whether some or all determinations of mixed questions of fact and law by circuit court judges are reviewable under the new intermediate standard—either by analogy to administrative determinations of mixed questions or because of similar functional concerns.[352] Before reaching any decision to expand the application of the clearly erroneous rule to mixed questions outside the administrative law context, however, it would be desirable for the court to consider the appropriateness of alternative standards of review for mixed questions. For example, one potential alternative is to use a bifurcated analysis, in which the

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351. A related question is whether the new intermediate standard of review applies to mixed questions in administrative law cases that are not decided under the Administrative Review Law. Thus far, the Illinois Supreme Court has given some indication that it does not. Although the issue of whether an injury arises out of employment within the meaning of the Workers' Compensation Act, 820 ILL. COMP. STAT. 305/2–305/30 (2003), is a mixed question, *see* O'Neill & Brody, *supra* note 6, at 518 & n.55, the court has in recent cases continued to apply the traditional manifest weight of the evidence standard of review, rather than the new clearly erroneous standard. *See, e.g.*, Saunders v. Indus. Comm'n, 727 N.E.2d 247 (Ill. 2000) (applying manifest weight of the evidence standard, without discussion or analysis).

352. At least one recent Illinois Supreme Court case indicates that the court may be reluctant to apply the new intermediate standard of review for mixed questions to decisions by the circuit courts. In *Eychaner v. Gross*, 779 N.E.2d 1115, 1130 (Ill. 2002), the supreme court held that a circuit court determination that a trust did not exist would not be disturbed unless it was against the manifest weight of the evidence. The supreme court thus rejected the position taken by the appellate court that the issues presented in *Eychaner* were mixed questions subject to review under the intermediate clearly erroneous standard of review. Eychaner v. Gross, 747 N.E.2d 969, 978 (Ill. App. Ct. 2001), *rev'd* 779 N.E.2d 1115. Although the supreme court's explanation of the legal elements of a trust indicates that the issue of the existence of a trust *is* a mixed question, the court, without explanation, appeared to label the issue as a question of "fact" only. 779 N.E.2d at 1131–32. Although its reasoning is not completely clear, the court seemed to ground its decision on functional concerns, emphasizing throughout the opinion that the trial court's determination that a trust did not exist was heavily based on assessments of witness credibility. *Id.* at 1130, 1138, 1139, 1141. Because a critical element supporting the existence of a trust is intent to create one, application of a deferential standard of review in *Eychaner* is consistent with the Ninth Circuit's functional approach to determining the applicable standard of review for mixed questions raising questions of intent. *See supra* note 170 and accompanying text. Nevertheless, it is not clear why the court in *Eychaner* implicitly deems the manifest weight standard of review to be more appropriate than the new and also deferential clearly erroneous test.

underlying basic facts are reviewed deferentially, but the application of the law to the facts is reviewed *de novo.*[353]

Another alternative is to adopt the Ninth Circuit's "functional approach," in which reviewing courts determine whether a particular mixed question is essentially factual or whether it requires the court to consider legal concepts and to exercise judgment about values.[354] Mixed questions that are essentially factual would be reviewed under either the manifest weight standard or the clearly erroneous standard, depending on the overall outcome the court wishes to encourage. Mixed questions that are heavily intertwined with legal interpretations and issues would be reviewed *de novo.* Although it can be difficult at times to apply in practice, this approach has the advantage of flexibility[355] and also tends to protect the appellate court's law-making powers to a greater degree than would a wholly deferential standard of review.[356]

A fourth and final step would be to give further guidance to those appellate courts that have expressed confusion or skepticism concerning the meaning, scope and applicability of the Illinois "clearly erroneous" rule.[357] For example,

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353. Following the Supreme Court's lead in so-called constitutional fact cases, Illinois courts are now using this bifurcated approach in some cases involving constitutional issues. *See supra* notes 147–61; 291. Some courts also apply a bifurcated approach to mixed questions that do not raise constitutional issues. *See, e.g.*, Graves v. Chief Legal Counsel, 762 N.E.2d 722, 724 (Ill. App. Ct. 2002) (contending that the clearly erroneous test for mixed questions has been replaced by a bifurcated analysis, citing the cases described in note 291 *infra*). Comprehensive use of the bifurcated analysis in the state system may be hampered by the fact that circuit court judges, unlike their federal counterparts, are not required to prepare separate written findings of fact. *See* PARNESS, *supra* note 6, §12–2, at 288 (no Illinois statute, rule, or case requires that judgments in civil bench trials be based on special findings of fact or conclusions of law).

354. *See supra* text accompanying notes 166–172.

355. 1 CHILDRESS & DAVIS, *supra* note 7, § 2.13, at 2–77; *supra* notes 166–72 and accompanying text. The Ninth Circuit's approach may also tend to validate the existing treatment in Illinois of particular mixed questions such as negligence. *See supra* text accompanying note 171.

356. To help guide the lower courts in applying a functional test of this nature, the supreme court might establish a presumption for handling mixed questions in the middle of the fact/law continuum. *See, e.g.*, 1 CHILDRESS & DAVIS, *supra* note 7, § 2.13, at 2–77 (because line drawing for mixed questions in the middle of the continuum is "almost impossible," an alternative would be "a consistent, though perhaps arbitrary, presumption"); Louis, *supra* note 21, at 1013 (general rule presumptively favoring either fact finders or reviewing courts in deciding mixed questions, "with whatever controls and exceptions" as are necessary, "is all that is practically possible"). To avoid confusion with evidentiary presumptions, such a rule treating mixed questions as presumptively "legal" or presumptively "factual" could be characterized as a "review presumption."

357. For one example of a confusing summary of Illinois standards of review, see *Chicago Transit Authority v. Amalgamated Transit Union*, 702 N.E.2d 284, 289 (Ill. App. Ct. 1988) (using "clearly erroneous" to describe the standard of review applicable to both a question of statutory construction and a mixed question). Some courts have jumbled together the clearly

at least one court has concluded that the manifest weight of the evidence and clearly erroneous standards of review are essentially the same, relying on a Seventh Circuit definition of "clearly erroneous" that is colorful, but quite misleading.[358] At some point, therefore, it would reduce confusion if the supreme court would clarify which of the various and sometimes conflicting federal court interpretations or explanations of the term "clearly erroneous" are applicable to mixed questions in Illinois.[359] To the extent feasible, it would also help if the court would attempt to discourage further unnecessary glosses on the meaning of "clearly erroneous" by the lower appellate courts on the ground that a proliferation of explanations often tends to generate more fog than light.[360]

In carrying out many of the foregoing steps, it would be particularly beneficial for the court to expand the type of functional analysis it undertook in *AFM Messenger Service* when it referred to the importance of administrative agency expertise.[361] Using federal decisions as a general guide, for example, the court might identify and articulate its expectations as to how the clearly erroneous rule or other selected standards of review for mixed questions will impact the allocation of resources between the courts and

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erroneous rule and other standards of review. *See, e.g.*, Enesco Corp. v. Doherty, 731 N.E.2d 888, 899 (Ill. App. Ct. 2000) (court concludes that agency's determination of mixed question was "clearly erroneous, against the manifest weight of the evidence"); Northwest Mosquito Abatement Dist. v. Ill. State Labor Relations Bd., 708 N.E.2d 548, 553 (Ill. App. Ct. 1999) (citing *City of Belvidere*'s clearly erroneous rule, the court explained that the agency's resolution of mixed question is to be affirmed "if reasonable, consistent with labor law and based on findings supported by substantial evidence"). Some courts have also expressed puzzlement over what a mixed question is. *See, e.g.*, Swank v. Dep't of Revenue, 785 N.E.2d 204, 212 (Ill. App. Ct. 2003) ("we have a difficult time imagining any case not involving the examination of the legal effect of a given set of facts"). *See also infra* note 358.

358. In *DuPage County Board. v. Department of Revenue*, 790 N.E.2d 918, 922 (Ill. App. Ct. 2003), the court observed that "[w]hat the 'clearly erroneous' test actually means . . . what it requires a court of review to do is perhaps ill-defined." After citing the Illinois Supreme Court's definition of "clearly erroneous" from the *Carpetland* case, the appellate court noted that "[t]his suggests that the test is essentially reducible to reasonableness and is thus, for all practical purposes, as deferential as the 'manifest weight' test used for purely factual issues." *Id.* The court then mis-characterized the clearly erroneous standard as "extremely deferential," citing the Seventh Circuit "dead fish" test. *Id.*; *see supra* note 80. *See also* Chicago Teachers Union v. Ill. Educ. Relations Bd., 2003 WL 22533408, at *9 (Ill. App. Ct. Nov. 7, 2003) (citing "dead fish" test with approval). *Cf.* School District of Wisconsin Dells v. Z.S. *ex. rel.* Littlegeorge, 295 F.3d 671, 674 (7th Cir. 2002) ("the cognitive limitations that judges share with other mortals may constitute an insuperable obstacle to making distinctions any finer than that of plenary versus deferential review.").

359. *See supra* Part I.C.2.

360. *See supra* note 218.

361. *See supra* text accompanying notes 311–14.

administrative agencies and, if relevant, between the circuit courts and appellate courts.

In undertaking an expanded functional analysis, however, the court should take into account the ways in which the state's institutional history, structure, and needs differ from the federal model. For example, the pressures on the time and resources of state and federal trial and appellate court judges may be different, thereby affecting decisions about the optimal allocation of resources. The Illinois appellate courts' perception of the average level of competency and impartiality of the original decision makers may also lead the courts to exercise a greater or lesser degree of scrutiny in carrying out their error-correction function than do the federal appellate courts. In any event, an optimally fair judicial system would not abandon or diminish the corrective function of the appellate courts except to the extent necessary to accommodate limitations on resources and reduce costs in time and money for the litigants themselves.[362] Where appellate courts are in a position to review mixed questions without straining time and resources, such as in many cases with undisputed or stipulated facts, the interests of fairness represented by the corrective function may therefore militate toward non-deferential, rather than deferential, review of mixed questions.[363]

In short, a recommendation that the supreme court take steps to clarify the scope and applicability of the new intermediate standard of review is not necessarily a recommendation to change the existing standard of review for many mixed questions, particularly those that are currently reviewed *de novo.* To the extent that resources permit and comparative expertise is accommodated, a presumption favoring non-deferential review of mixed questions tends to maximize the state appellate courts' central role in "making law" in areas where the legislature has not stepped in or where there are gaps in statutes or rules that must be filled in by judicial interpretation. By leaning toward non-deferential review of mixed questions of fact and law, the appellate courts would thus ensure that they adequately fulfill their primary role of ensuring the coherence and consistency of those legal rules that develop over time through the application of law to facts, as is characteristic of and central to the common law.[364]

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362. *See supra* notes 133–34; 140-44.

363. In such cases, the original fact finder's superior ability to make credibility determinations is also not implicated as a general rule. *See supra* notes 123–25.

364. *See* Calleros, *supra* note 74, at 423–24 ("The precise meaning and scope of an abstract statement of law often is clarified only on repeated applications of the legal rule to the facts of different cases, adding flesh to the bones of abstraction"; appellate review of mixed questions thus "facilitates development of the legal rule, in furtherance of the appellate court's institutional function"). The importance of this aspect of common law development

VI. CONCLUSION

Some of the original goals of Professors O'Neill and Brody when they proposed a requirement that appellants include a discussion of the standard of review in their briefs appear to have been met. Appellate court decisions, including those of the Illinois Supreme Court, seem at times to be focusing more attention on the choice and application of standards of review. There is more "serious discussion" of the issue, and there are greater attempts at articulating the reasons for choosing a particular standard. Nevertheless, many appellate decisions continue to devote time and space to only cursory or, at times, even confusing discussions of the standard of review. Other decisions continue to omit any reference to or discussion of the standard of review applicable to particular issues, leaving it to the reader to infer from the context which standard of review was applied. Where the courts have turned to the development of a new standard of review, the process has been uncertain, as discussed in Parts IV and V. Thus, Illinois courts' treatment of mixed questions of fact and law and other issues on appeal continues to be "mixed up" both in description and practice.

The lingering confusion over the appropriate choice and application of standards of review for mixed questions is not, however, unique to Illinois courts. Aspects of the federal standard of review for mixed questions of fact and law have been described, for example, as a "Serbonian bog."[365] Nevertheless, it is incumbent on the appellate courts to continue to try to guide both decision makers and litigants through that bog by articulating the meaning and scope of the standards of review as clearly as possible.

To maintain faith in the integrity of the appellate system, it is also important for the appellate courts to endeavor to apply the selected standards as consistently as possible. But, a perfectly understandable and a perfectly applied system of appellate review is inherently unattainable and probably undesirable. In this regard, the admonition of Justice Frankfurter in *Universal Camera Corp. v. National Labor Relations Board*[366] still rings true:

> A formula for judicial review . . . may afford grounds for certitude but cannot assure certainty of application. Some scope for judicial discretion in applying

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was stressed by Judge Friendly in *Mamiye Bros. v. Barber Steamship Lines, Inc.*, 360 F.2d 774, 776–78 (2d Cir. 1966) (applying a *de novo* standard of review to a district court finding of lack of negligence).

365. Junior v. Texaco, Inc., 688 F.2d 377, 379 (5th Cir. 1982).

366. 340 U.S. 474 (1951).

> the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry. It cannot be too often repeated that judges are not automata. The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and the constant play of an informed professional critique upon its work.